83-993

No._____

IN THE

Supreme Court of the United States

October Term, 1983

IMPRO PRODUCTS, INC.,

Petitioner,

vs.

JOHN B. HERRICK, BABSON BROS. CO., UPJOHN CO. and PHILIPS ROXANE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the conspiracy provisions of §§ 1 and 2 of the Sherman Act apply to a "hub-and-spoke" civil conspiracy?

2. What is this Court's standard for proving an antitrust civil conspiracy and, or in the alternative, in establishing such a standard should distinctions be drawn concerning the scope of the requirement for proof of concerted action, depending on the underlying antitrust policy sought to be enforced?

3. Was Petitioner denied due process not only by the prophylactic function of the summary judgment procedural device cutting off the right to present the case to a jury but also by the District Court not explicitly considering Petitioner's "hub-and-spoke" conspiracy theory?

4. Should a distinction be drawn between the requirements for proof of concerted action under the Sherman Act and the civil procedure requirements for joinder of multiple conspiracies?

5. Was there sufficient evidence present to raise a genuine issue of material fact to be tried by a jury, or, in the alternative, on this record should not the lower courts have held that the defendants were not entitled to summary judgment as a matter of antitrust conspiracy law?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the proceeding in the Court of Appeals (Supreme Court Rule 21.1(b)), except for defendant Richardson, Myers & Donofrio, which entered into a settlement agreement with Petitioner subsequent to the decision of the Court of Appeals. Two other corporate defendants, Diamond Laboratories, Inc. and G.D. Searle & Co. entered into settlements with the plaintiff prior to the district court's order granting summary judgment in favor of the remaining defendants. The Petitioner, Impro Products, Inc., is a closely held corporation and has no parent company or subsidiary or affiliated companies.

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Petitioner, Impro Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit filed on August 11, 1983.

OPINIONS BELOW

The opinion, dated August 11, 1983, of the Court of Appeals for the Eighth Circuit, is officially reported in 715 F.2d 1267 and is unofficially reported in 1983-2 CCH Trade Cas. ¶65,540. The opinion is reprinted in the Appendix hereto beginning on page A-1. The Memorandum and Order, filed August 13, 1982, of the United States District Court for the Southern District of Iowa, Central Division, is unofficially reported in 1982-2 CCH Trade Cas. ¶64,906. The opinion is reprinted in the Appendix hereto, beginning on page A-27. The Ruling of the District Court dated October 19, 1982, denying Petitioner's motion for rehearing, is reprinted in the Appendix hereto, beginning on page A-60, and the Supplement to the Footnote in that ruling, dated October 20, 1982 is reprinted on page A-62.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1). The judgment of the Court of Appeals was entered on August 11, 1983. On October 20, 1983, Mr. Justice Blackmun of this Court, extended the time for filing this petition to and including December 8, 1983. By Order dated December 2, 1983, said time period was further extended to and including December 17, 1983.

PROVISIONS OF STATUTES, CONSTITUTION AND RULE INVOLVED

Statutes

Sherman Act

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." (15 U.S. Code, Sec. 1)

Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." (15 U.S. Code, Sec. 2)

Clayton Act

Section 4. "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S. Code, Sec. 15)

Constitution

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Rule

Rule 56(c) of the Federal Rules of Civil Procedure, provides in pertinent part:

". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW.

This is a private antitrust action filed under 15 U.S.C. § 15, alleging a conspiracy to restrain and monopolize trade and commerce in a segment of the animal health industry, in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Petitioner alleges that each of the individual corporate Defendants contracted, combined and/or conspired with a U.S. Department of Agriculture (USDA) Extension Service veterinarian, Defendant John B. Herrick, and that in furtherance of each of such respective contracts or combinations, Herrick utilized his public office as a forum from which he engaged in a series of acts which were designed to destroy Petitioner as a competitor of each of the corporate Defendants in their respective areas of the livestock health products market.

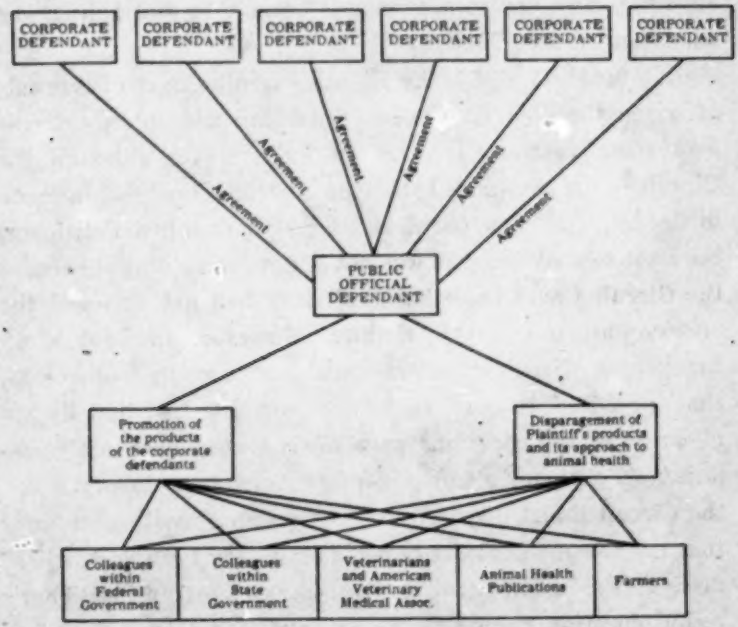
On August 13, 1982, the District Court issued a Memorandum Opinion granting Summary Judgment to each of the non-settling Defendants.

On August 23, 1982, Petitioner filed a Motion for Rehearing pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Petitioner's Motion for Rehearing was denied on October 19, 1982 and a supplement to the footnote in that ruling was added on October 20, 1982.

On August 11, 1983, the Eighth Circuit Court of Appeals affirmed the District Court's order but did so in extreme *boot strap* fashion. That is, in footnote 16, although the Circuit Court recognized that the District Court did in truth utilize the 'conscious parallelism' doctrine against Petitioner, the issue of that doctrine was not addressed on appeal because the Circuit Court held that Petitioner had not appealed the "horizontal conspiracy" finding. However, in *boot strap* fashion the Circuit Court assumed and said, in footnote 15, that the District Court must have been satisfied that its application of the conscious parallelism theory adequately disposed of Petitioner's "hub-and-spoke" conspiracy theory. Thus, the Circuit Court disposed of Petitioner's appeal on grounds that the Circuit Court recognized as having been "explicitly" distinguished and "urged" to the District Court in Petitioner's reconsideration motion to the District Court *but which had never been explicitly addressed* by the District Court. In short, because of the assumption in footnote 15 and the non-consideration expressed in footnote 16, the Petitioner truly has *never* been given a *full* day in court at either one of the District or Circuit court levels.

B. THE RESTRAINT OF TRADE.

Petitioner alleged a conspiracy to restrain trade and monopolize a segment of the animal health industry, which can be depicted by the following diagram:



The "core" of the antitrust conspiracy alleged by Petitioner was that each of the corporate defendants engaged the public official defendant, Dr. John Herrick, to act on behalf of its commercial interests, and that the actions so taken included not only the promotion of their respective products, but also the use of false and misleading communications to disparage and discredit the Petitioner, Impro Products, Inc. (Impro),

in an attempt to destroy the Petitioner as a competitor.[1] The concerted action alleged by Petitioner consisted of a series of "vertical" agreements between each of the corporate defendants and the central public official, pursuant to which anticompetitive acts were undertaken by the public official on behalf of the corporate defendants.

One must first recognize the structural barriers to entry into the animal health industry created through the labyrinth of federal and state regulations, and the absolute *necessity* of acceptance by veterinarians. It is also necessary to understand the rapidly growing problem created by the use of antibiotics in animal health, and the competitive threat to the dominant firms in the industry which would be created if Petitioner's product which contains no antibiotics, and leaves no residues, were to gain acceptance in the market. The use of Impro as an alternative to antibiotic products has long been a major public interest in the animal health industry. As Dr. Herrick wrote in October, 1969, "[I] personally don't know of a product or an issue that has been more controversial in the veterinary profession than [Impro]." (Rec. 83; Rec. 469).

Antibiotics are used in the animal health industry in two ways: as a traditional drug product for treatment of specific diseases or conditions; and, as a health maintenance additive in animal feed. Approximately forty percent of antibiotics sold in the United States are utilized for *animal* health purposes. Since the late 1950's widespread public controversy has ensued over the indiscriminate use of *antibiotics* by farmers,

[1] Dr. Herrick's disparaging of Petitioner went far beyond mere expressions of skepticism or doubt as to the concept behind the products, and included suggestions to his U.S.D.A. colleagues, later admitted to be without basis in fact, that the product could cause the spread of deadly and contagious diseases.

without the supervision of veterinarians, in connection with animals raised to provide meat and dairy products for human consumption.

The industry's concern over the abuse of antibiotics in animal health first surfaced in the United States in 1958, when the United States Food and Drug Administration (FDA) began regulating the antibiotic residues in products used in controlling mastitis, an abnormal condition of the mammary glands of dairy cows. As a result, in the early 1960's, numerous antibiotic-based products were taken off the market. Another FDA inquiry concerned mixing antibiotics in animal feed. In 1970, FDA appointed a committee to investigate the matter, and soon thereafter the trade association of the major animal health product manufacturers, the Animal Health Institute (AHI), formed a committee to represent the industry in the matter. A "crisis" in the industry was created in 1974 when for a period of time the United States Food and Drug Administration refused to certify any antibiotics for mastitis treatment. In 1978 the FDA issued proposed rules restricting the use of certain antibiotics. Federal Register, Volume 43, No. 14—Friday, Jan. 20, 1978. Public hearings were held on the proposal in Ames, Iowa on March 23, 1978. (Docket No. 7711-0318: re: PROPOSED REGULATIONS ON DISTRIBUTION CONTROLS: PENICILLIN AND TETRACYCLINES IN ANIMAL FEEDS.) Defendant Herrick appeared as a witness at this hearing. Claiming to speak on his own behalf, he opposed the restriction on antibiotic use. A "blind" copy of his offer to be a witness was sent to American Cyanamid. (Rec. 212). The Office of Assessment of the U.S. Congress also investigated use of antibiotics in animal feeds. The resulting report was released in 1980. One of the major concerns relating to re-

stricting antibiotic use in animal feeds was the lack of a viable alternative treatment.

Although antibiotic residues are troublesome to farmers raising cattle, swine and poultry, the greatest urgency occurs in the dairy industry. State laws prohibit the sale of milk adulterated by antibiotic residue, and the sensitivity of instruments able to detect such residues has improved in recent years. Consequently, products such as that of Petitioner, that leave no residue and require no milk throw-away offer a significant competitive advantage in the dairy industry.

Over the last 20 years, Petitioner has developed, field-tested and marketed various animal health products which consist of derivatives of whey obtained from cows that have been infused with selected antigens. Use of these products leaves no residues and requires no milk throw-away. Petitioner's management has long been quite competitive in opposition to the promiscuous use of antibiotics in the animal health field. Petitioner's advertising has emphasized the fact that Petitioner's product is marketed as an *alternative* to antibioitic use. The informational handbook for dairymen, produced by Petitioner, discourages the indiscriminate use of antibiotics, as they upset the natural protective functions and build resistant forms of bacteria in the animals.

Throughout the 1970's there has been a constant conflict between the "interstate" and "intrastate" biologics firms. The Animal Health Institute (AHI), led by representatives of defendants Philips and Diamond, have used a combination of litigation and lobbying of the Department of Agriculture and the Congress, and public information programs to attack the existence of "intrastate" firms. The two major intrastate firms which have been the subject of AHI's concern are Petitioner and Grand Laboratories, Inc. (Rec. 644).

Animal health products may be classified as "drugs", many of which contain antibiotics or other residue-producing chemicals, and "biologicals," products such as vaccines and serums which produce no such residues. Animal drugs are subject to federal regulation by the FDA, and this regulation extends to drugs marketed wholly within one state, if they contain components that have been shipped interstate. In contrast, biologicals are regulated by the states and by the United States Department of Agriculture (USDA), whose jurisdiction extends only to those products which are actually marketed in interstate commerce. This scheme of federal regulation permits firms producing animal biologics to produce and sell new products on an intrastate basis, and also provides a means of entry into the animal health field by small firms such as Petitioner, developing new and innovative products while avoiding the high costs and regulatory delays in obtaining federal licenses. (Rec. 618). Animal drugs are regulated pursuant to Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. Biological products distributed in interstate commerce are regulated by the U.S. Department of Agriculture pursuant to the Virus, Serum, Toxin Act of 1913, 15 U.S.C. §§ 151-58.

Petitioner's products are classified in three major categories: "food" products, which are marketed in interstate commerce and regulated pursuant to state commercial feed laws; products which are marketed as an aid to the prevention or control of infections in dairy cattle and other animals, which are produced on a wholly intrastate basis in Wisconsin, Iowa, Minnesota and Illinois in individual laboratories in each state; and teat dips and udder cleansers, which are sold throughout the United States.

Defendant, Upjohn Co. (Upjohn), produces a large number of animal drugs containing antibiotics. Philips Roxane, Inc. (Philips) produces animal drug products containing antibiotics, federally licensed animal biologics products and teat dips. Babson Brothers Co. (Babson) is a dairy industry equipment and supply company which produces teat dips. Former defendant Richardson, Myers and Donofrio is an advertising and public relations firm which has as one of its clients American Cyanamid Company, one of the major producers of antibiotics for use in the animal health field. Former Defendant Diamond Laboratories, Inc. (Diamond) is a federally licensed manufacturer and supplier of antibiotic drugs and biologicals.

Petitioner competes with the corporate respondents in several significant respects. First, the Petitioner's treatment approach to animal health is offered as an *alternative* to the use of antibiotics. Thus, Petitioner competes directly with the producers of such animal drugs. (Rec. 12). Second, as one of the two leading "intrastate" producers of products using a preventative biological approach to animal health, Petitioner competes with those firms which market such biological products on an interstate basis. Third, Petitioner's teat products compete with those of Babson and Philips Roxane.

The "hub" of the conspiracy, Dr. John Herrick, is probably the best known veterinarian in the United States. There is probably no veterinarian who is better known to the average producer than Dr. Herrick. In addition to his position as a United States Department of Agriculture Extension Service veterinarian, he also had the prestige of being associated with one of the leading agriculture education centers in the world, Iowa State University. Dr. Herrick has held the position of

President of the American Veterinary Medical Association and has been a member of an exhaustive list of veterinary groups, farm organizations, and industry associations.

Since the 1950's, Dr. Herrick's office has been on the campus of Iowa State University, and in his capacity of Extension Veterinarian he has also held the rank of professor at ISU. Although he taught no classes, he occasionally lectured there. Much of his consulting work on behalf of the corporate respondents was performed utilizing ISU stationery, secretarial assistance and mailing privileges. (Herrick Dep. 17-18). However, Dean Pearson testified that Dr. Herrick was not authorized to use ISU property for consulting. (Pearson Dep. 93-94). Dr. Herrick was a communicator: he gathered information on animal health and circulated it through the veterinary and farm communities. See, footnote 9 of the Circuit Court opinion (A-12).

During the period of the conspiracy Dr. Herrick received secret payments from each of the corporate defendants. If this case had been permitted to go to trial, a major fact issue for resolution would have been whether such payments were the source of Herrick's anti-competitive campaign against Petitioner and its products.

ARGUMENT

I. THIS COURT SHOULD DECIDE THAT THE CONSPIRACY PROVISIONS OF §§ 1 AND 2 OF THE SHERMAN ACT DO APPLY TO A "HUB-AND-SPOKE" CIVIL CONSPIRACY.

The seminal case is this Court's opinion in *Kotteakos vs. United States*, 328 U.S. 750 (1946). That was a criminal case against one central "hub" and thirty-one "spokes". None of the spokes knew each other. This Court regarded the scheme as multiple conspiracies and held that it was error to instruct the jury that just one conspiracy existed. That opinion implied that in a multiple conspiracy case it would not be error to submit the entire case to a jury with proper instructions of proof required about each defendant's participation in the respective conspiracies. 328 U.S. at 769-770.

The Circuit Court opinion herein, at footnote 14, recognized that this Court has not yet squarely decided the question of whether the conspiracy provisions of §§ 1 and 2 of the Sherman Act apply to a hub-and-spoke conspiracy. The Eighth Circuit said it believed that the answer would be in the affirmative and cited this Court's opinion in *Kotteakos* and two opinions by lower courts "implicitly" recognizing such a conspiracy if plaintiff introduces sufficient evidence to demonstrate that one exists. *Elder-Beerman Stores Corp. vs. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972); *Harlem River Consumer Cooperative, Inc. vs. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1279 (S.D. N.Y. 1976). The time is now ripe for this Court to decide this important threshold question of the applicability of the conspiracy provisions of the Sherman Act. This is the case in which the question can be addressed directly and squarely determined.

In addition, the need for guidance from this Court can be illustrated by reference to the conflict between the circuits as to what is needed to show some types of conspiracies. There is an apparent conflict between *Tose vs. First Pennsylvania Bank*, 648 F.2d 879, 894 (3rd Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Weit vs. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir., 1981), *cert. denied*, No. 81-152 (March 1, 1982); and the *Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. granted*, May 17, 1982, Nos. 81-1618 and 81-1619. Although courts and commentators generally do see the underlying legal principle, nevertheless the absence of an explicit statement of law has led to the confusion in the lower courts. The time is now ripe for this Court to seize the opportunity presented here to dispel this confusion by making explicit the analytical basis for its earlier decisions about antitrust conspiracies, *infra*.

II. THIS COURT SHOULD NOW ADDRESS AND SETTLE THE IMPORTANT QUESTION OF WHAT STANDARD OF PROOF IS REQUIRED TO INFER A CIVIL ANTITRUST CONSPIRACY AND WHETHER OR NOT SUCH A PROCESS SHOULD INCLUDE A DISTINCTION OF PROOF DEPENDING ON THE UNDERLYING ANTITRUST POLICY SOUGHT TO BE ENFORCED.

This Court has not directly addressed the issue of what is required to infer a conspiracy since its decision over a quarter of a century ago in *Theatre Enterprises vs. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) which involved so-called "conscious parallelism." This Court sought to address the question when it granted writs of certiorari May 17, 1982, in *Weyerhaeuser Company, et al. vs. Lyman Lamb Company, et al.*, No. 81-1618, and *Georgia-Pacific Corp. vs. Ly-*

man Lamb Company, et al., No. 81-1619, October Term 1981, but that case was settled and dismissed before decision by this Court. That case presented the apparent conflict between decisions of the Fifth Circuit in that case and the Ninth Circuit, and others on the other side, over what is required beyond "conscious parallelism" to *infer* a conspiracy, *supra*.

In Petitioner's case here, the Eighth Circuit purported to adopt and apply the three-fold hub-and-spoke conspiracy test described by the Third Circuit in *Elder-Beerman Stores Corp. vs. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972). That three-pronged test has not yet been addressed and settled by this Court. The Circuit opinion herein, noted and relied heavily on, the denial that any of the corporate defendants knew that Dr. Herrick even had consulting agreements with any of the other corporate defendants. This expressed lack of knowledge was a key factor described in the opinion of the District Court (A-57). The Circuit Court opinion not only quoted verbatim (A-17) that particular finding of the District Court but also went on later in its opinion (A-25) to use it as a failure to meet the so-called *Elder-Beerman* test. There is a glaring oversight by the Circuit Court here because its opinion fails to recognize the inaccuracy admitted to by the District Court in the footnote to its Ruling, dated October 19, 1982, denying Petitioner's motion for rehearing (A-60) and added to by that Court the next day, October 20, 1982, in a "Supplement To Footnote In Ruling." Both of the lower courts have attempted to ignore the obvious material fact question raised by the deposition testimony in the Record by Norman Jungk who was employed at two different times by two different defendants and both times knew of the connections each of those two defendants had with Dr. Herrick. That fact alone should have been enough

to defeat summary judgment and should have been allowed to stand as a triable inference of the requisite concerted action.

Professor Sullivan, in his widely cited treatise on Antitrust, makes it clear first that, "It is ancient learning that contractual assent can be inferred from conduct." Sullivan, Handbook of the Law of Antitrust (1977) 313. That author then goes on to note a conspiracy can be "shown by evidence from which its existence can be inferred." For that proposition, he cites many decisions of this Court. *Supra*, at 314 n.7. Particularly applicable to avoiding summary judgment is his statement of overview as follows:

> "All considered, there is a wide range of possible ways to show conspiracy; anything logically indicative will likely be admissible and will warrant *a jury making* the damning inference." *Supra*, at 315 (emphasis herein).

Professor Sullivan does not mention the hub-and-spoke conspiracy theory nor does his book contain a citation of this Court's opinion in *Kotteakos vs. United States, supra*. The time is now ripe for this Court to settle not only the question of the applicability of the hub-and-spoke conspiracy theory but also to settle the question of what inferences need be shown so that an antitrust plaintiff can earn its way to a *jury*. If the test is to be a so-called 'plus factor,' *Sullivan, supra* at 319, then this Court should now settle that important question of federal antitrust law by using Petitioner's case as a vehicle to reach the question. This Court had obviously issued the Writ in the *Plywood* cases, *supra*, to settle the question of inferred conspiracy arising under the doctrine of "consciously parallel" behavior. If the lower courts are confused over the requirements of applying that much discussed doctrine, see for example *Tose vs. First Pennsylvania*

Bank, 648 F.2d 879 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981) and *Weit vs. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (1981), *cert. denied*, No. 81-152 (Mar. 1, 1982), then they certainly need to have the hub-and-spoke conspiracy doctrine questions settled by this Court.

This case also presents an opportunity to extend the *Brunswick* rationale to the analytical process utilized in determining the existence of concerted action. In *Brunswick Corporation vs. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court caused a far reaching impact on the development of a sound body of antitrust law, by establishing that an analysis of the propriety of awarding damages in antitrust cases must be made in the context of an awareness of the fundamental policies underlying the liability issue in a particular case. This Petition presents an opportunity to the Court to extend the fundamental rationale upon which *Brunswick* was based: to establish that the requirements for proof of a contract, combination or conspiracy must likewise take into consideration the antitrust policy underlying the particular type of violation alleged. A few illustrations will make the point:

> In cases involving horizontal collaboration among competitors—horizontal price fixing, for example—proof of an agreement itself provides the basis for a finding of a "conspiracy".[2] Since the basis for such a cause of action is proof of doing jointly what is perfectly legal if performed unilaterally, it makes good sense and for sound antitrust policy to require clear and explicit proof of an actual agreement. Anything less could catch in the antitrust snare wholly lawful conduct which coincidentally matches that of a competitor. It is for this reason that

[2] *U.S. vs. Trenton Potteries Co.*, 273 U.S. 392 (1927).

"conscious parallelism" standing alone will not suffice to establish the existence of concerted action.[3]

In cases involving collaborative action with the purpose or effect of excluding a competitor from the marketplace by means of denying it the use of an essential facility[4] or organization membership[5] concerted action is also usually a given; the issue in that type of case is one of anticompetitive *impact*—does the denial of the privilege in question sufficiently diminish competition in the marketplace so as to warrant invocation of an antitrust remedy?

In the case of anticompetitive conduct which is alleged to have been undertaken by one party on behalf of another, with the purpose or intent of blocking the development of a competitor of the latter, where the existence of collaborative action—that is, *some* type of agreement, between the agent and the defendant is a given, the fact issue for resolution is one of pure causation: were the anticompetitive actions alleged in fact unilateral—that is, for a reason unrelated to the relationship with the alleged principal (in which case there is no liability)—or were such actions undertaken on behalf of and at the behest of the defendant?[6]

In this case the District Court set off on a fruitless search—utilizing the conscious parallelism concept as its road map—for proof of a conspiratorial *agreement*. All of the cases relied upon for the standard of proof were horizontal collaboration

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[3] *Theatre Enterprise, Inc. vs. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

[4] *Otter Tail Power Co. vs. U.S.*, 410 U.S. 366 (1973).

[5] *Associated Press vs. U.S.*, 326 U.S. 1 (1945).

[6] *Poller vs. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962).

cases where proof of an agreement would have established the violation itself. *None* of the cases relied upon by the District Court dealt with the issue of causation—a factual issue involving credibility which can only properly be determined at trial by a jury.

The fact issue which is at the heart of this case is whether Dr. Herrick's admittedly anti-competitive actions were performed unilaterally, or in furtherance of his duties for the corporate defendants. The fact that the parties deny the existence of the conspiracy is meaningless: they all denied that Herrick helped them in marketing as well, yet the evidence to the contrary was overwhelming.

III. PETITIONER WAS DENIED DUE PROCESS NOT ONLY BY SUMMARY JUDGMENT CUTTING OFF ITS RIGHT TO PRESENT THE FACTUAL INFERENCES TO A JURY BUT ALSO BY THE DISTRICT COURT NOT EXPLICITLY CONSIDERING THE HUB-AND-SPOKE CONSPIRACY DOCTRINE.

With regard to the first constitutional question raised above, Irving R. Kaufman, Chief Judge of the Second Circuit expressed it well in *Heyman vs. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (1975) as follows:

> "This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to a jury."

This Court expressed a view in *American Tobacco Company vs. United States*, 328 U.S. 781, 810 (1946) as follows:

> "Where the *circumstances* are such as to warrant a *jury* in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of

minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." (Emphasis added herein.)

In the most often cited opinion of this Court regarding summary judgment, *Poller vs. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962) this Court noted that:

"Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even-handed justice'."

The proceedings in the lower courts herein are in conflict with the pronouncement of this Court in *Poller, supra.* The Circuit opinion here agreed with and quoted from the District Court holding that any inferences of concerted action were conclusively rebutted by denials of the conspiracy agreement, under oath by Dr. Herrick and officers of the corporate defendants who had either been deposed or given affidavits. See Circuit opinion at A-17. First, it should again be noted that the quoted statement is wrong on the record about knowledge because of the deposition testimony of Norman Jungk, see A-60. Second, and most important, is that this is another important question of federal antitrust law which has not been but should be settled by this Court. Professor Sullivan, *supra*, at 319, takes specific note that one court has allowed a defendant to take conclusory evidence from alleged conspirators that they made no 'agreement' and had no 'understanding.' In footnote 21, he cites *United States vs. Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963). In *First Nat. Bank of Arizona vs. Cities Services Co.*, 391 U.S. 253 (1968) this Court was concerned with a plaintiff that relied on the conspiracy allegations contained in that complaint. This Court simply made it clear that antitrust plaintiffs cannot "get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those

allegations. . . ." 391 U.S. at 289 and 290. This Court noted there that the only evidence produced by that plaintiff was "his allegation that the failure to deal resulted from conspiracy." 391 U.S. at 289. Earlier in that opinion this Court had reiterated the holdings of *Theatre Enterprises, Inc. vs. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) and *Interstate Circuit vs. United States*, 306 U.S. 208 (1939) that:

> ". . . 'business behavior is admissible circumstantial evidence from which the fact finding may infer agreement, . . .'"

As thereafter noted in that opinion by this Court, the situation in *First Nat. Bank* concerned defendants whose interests were "substantially divergent." 391 U.S. at 288. In Petitioner's case herein the interests of the defendants were *not* divergent but instead were substantially *convergent*, i.e. to beat down the competitive threat of Petitioner.

Petitioner was also denied due process by not being given a full day in court at either the district or circuit levels. As explained more detailed herein, *supra*, at page 5, it is beyond dispute that the District Court did not explicitly address Petitioner's hub-and-spoke conspiracy and instead addressed the case as though it was based on "conscious parallelism." The Circuit Court did address Petitioner's hub-and-spoke conspiracy but simply assumed that the District Court had that theory in mind in denying, *without opinion*, Petitioner's motion for reconsideration. There was no basis for such an assumption by the Circuit Court, especially, for example, in light of the District Court's excusing its own serious oversight of the deposition record of Norman Jungk. See footnotes 15 and 16 of the Circuit Court opinion, A-25, 26, and footnote 1 with following supplement to footnote 1, in the District Court's denial of Petitioner's motion for rehearing, A-60 and A-62 respectively.

IV. THIS CASE ALSO PROVIDES AN OPPORTUNITY TO CLARIFY THE DISTINCTION BETWEEN THE SHERMAN ACT REQUIREMENTS FOR PROOF OF CONCERTED ACTION AND THE CIVIL PROCEDURE REQUIREMENTS FOR JOINDER OF MULTIPLE CONSPIRACIES.

A comparison of the following fact patterns illustrates the distinction between the Sherman Act requirements for a concerted action, and the proof requirements for joinder of multiple conspiracies as a simple trial:

ILLUSTRATION #1

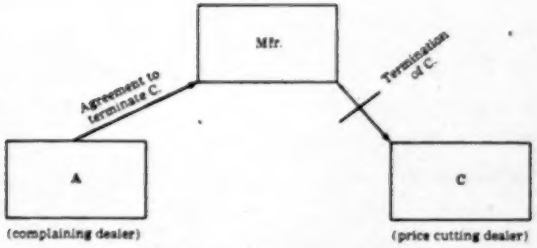
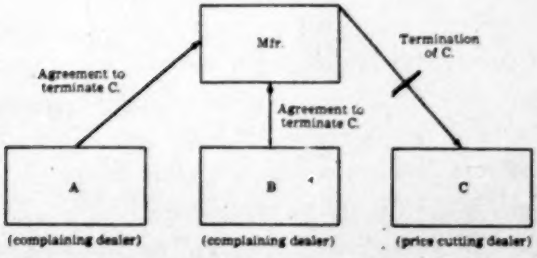


ILLUSTRATION #2



Assuming for the moment that Illustration #1 would in fact result in a finding of liability, would it make any difference in Illustration #2 if A and B had no knowledge of each

other's dealings with manufacturer? Of course not! Search for an *agreement* between A and B would be superfluous as a matter of *antitrust* law. Whether one or two "conspiracies" exist is rather a matter of *civil procedure.*[7]

Transposed to the instant fact pattern, the question is this: as a matter of *antitrust* law does it matter whether, say, Defendant Philips Roxane, Inc., and Defendant Upjohn Company, can be shown to have agreed *between themselves* to attempt to destroy Petitioner? Of course not! As a matter of civil procedure it *does* make a difference in terms of whether the case can be tried as a single conspiracy, but as a matter of the meeting of the basic Sherman Act requirement for two or more persons acting in concert, Herrick and *any* corporate defendant acting in collaboration would be sufficient.[8]

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[7] A similar procedural issue would cause in a Klor's type refusal to deal with a situation where if there were no question of dealer-supplier coercion, but yet lack of proof of whether the various coerced dealers refused to deal solely because of the coercion, or rather coercion plus inter-supplier concerted action. Compare *Klor's vs. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1958) with *Elder Beerman Stores vs. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972).

[8] To further illustrate the importance of analyzing such situations in light of the antitrust policy sought to be enforced, consider a third example: A and B set their prices using a joint agent, C. Neither the A-C relationship nor the B-C relationship would constitute price fixing, but if C is knowingly used as a common agent of both A and B to set prices, a violation results. See *In re Sugar Antitrust Litigation, cert. denied,* 441 U.S. 932 (1970); *In re Plywood Litigation,* cited herein as *Weyerhaeuser vs. Lyman Lamb Co.* In contrast, in a "blocking of a competitors" case, a single competitor acting with *any* third party is sufficient. See *International Travel Arrangers, Inc. vs. Western Airlines, Inc.*, 635 F.2d 1255 (8th Cir. 1980), *cert. denied,* 459 U.S. 1063 (1980).

V. THERE WERE AMPLE FACTS WITH WHICH TO GO TO A JURY, AND SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED AS A MATTER OF LAW.

This Court has said that this type of case "presents peculiar difficulties because the issue of fact crucial to Petitioner's case is also an issue of law, *namely the existence of a conspiracy.*" *First Nat. Bank, supra,* 391 U.S. at 289 (emphasis added herein). Petitioner's complaint here was supported by significant probative evidence, both direct and inferential.

The Circuit Court ruled expressly in favor of Petitioner on a number of important issues relevant to getting the case to a jury. *First,* it ruled (A-9) that Petitioner had alleged a "cognizable conspiracy" to violate the Sherman Act within the recent decision of this Court in *American Society of Mechanical Engineers, Inc. vs. Hydrolevel Corp.,* 456 U.S. 556 (1982) (disparagement activity by the Chairman of a subcommittee of a society of engineers) and *International Travel Arrangers, Inc. vs. Western Airlines, Inc.,* 623 F.2d 1255 (8th Cir.), *cert. denied,* 459 U.S. 1063 (1980) (airline conducted a campaign of falsehoods and deception to throttle a competitive threat).

Second, in footnote 9 (A-12) the Circuit Court ruled that Dr. Herrick could indeed be found to have conspired with each corporate defendant, citing this Court's holdings in both *Poller, supra,* and *American Society of Mechanical Engineers, Inc., supra.*

Third, the Circuit Court enumerated and described certain evidence of the anti-competitive activities carried on over a long time period of some twenty years by Dr. Herrick and the defendants against Petitioner. (e.g., A-13 - A-16).

Fourth, the Circuit Court noted the anti-competitive activities by Dr. Herrick's repeated disparagement of Petitioner's products while at the same time he promoted the defendants' products. (A-13). The Circuit Court even went further to note that the concealment of money being paid from the corporate defendants to Dr. Herrick when he engaged in such double-barrelled anti-competitive conduct against Petitioner, may well have been unethical or unwise. Note, that if Dr. Herrick acted "unethically or unwisely" (A-21) it should be assumed it was against his own professional self-interest and those of the defendants should it be exposed as herein. This alone is a so-called "plus factor" if such is needed to infer a hub-and-spoke conspiracy.

After first taking note of the abundance of direct evidence of the anti-competitive behavior of Dr. Herrick, the Circuit Court nevertheless concluded that the activities "were of his own volition and not the result of some unlawful agreement." To so conclude in the face of such direct evidence involving Dr. Herrick and the corporate defendants not only was an incorrect application of this Court's line of cases from *Poller, supra*, but also was in conflict of this Court's line of cases including *American Tobacco Co., supra*, allowing proof of conspiracy by inference. The credibility of witnesses is a jury matter and here there was a vast amount of impeaching evidence. The Eighth Circuit apparently was looking for the so-called "smoking gun" type of proof that is rarely found in antitrust conspiracy cases. The Circuit gave great weight to the wording of the "consulting agreements" between Dr. Herrick and the various corporate defendants. (A-18). It is naive and requiring a "smoking gun" to think that said written agreements would have spelled out the terms of the conspiracy. Too much emphasis was placed on said agree-

ments.[9] The Seventh Circuit reversed a directed verdict for defendants in *Moraine Products vs. ICI America, Inc.*, 538 F.2d 134, 146 (7th Cir. 1976), *cert. denied*, 429 U.S. 941 (1976), where the focus of analysis had wrongfully concentrated on a written patent license agreement. That court noted as follows:

> ". . . but no formal agreement need be shown in order to establish an antitrust violation. Indeed, well counselled restraint-combiners could scarcely be expected to put or leave in their files detailed written documentation of their illegal purposes which, of course, does not mean that they might not resort to documentation of the 'window-dressing' type."

It is the *extensive* anti-competitive activities by Dr. Herrick over an *extended* period of time from which a jury could infer a conspiracy in violation of the Sherman Act.

The Circuit Court held there was no evidence that the corporate defendants gave Dr. Herrick "an explicit or implicit charge to promote their products or to attack those sold by their competitors." (A-20). It is incredulous that the Circuit Court held there was no "record evidence that the corporate defendants were aware of Dr. Herrick's activities

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[9] Professor Sullivan, *supra*, at 313 notes, that this Court has *not yet* discriminatingly answered the two questions of whether the agreement must be expressed or can be inferred and then from what kinds of evidence may its presence be inferred. This case presents those questions to this Court.

Professor Sullivan also noted, *supra* at 316, about the holding of this Court in *American Tobacco*, *supra* that:

> "Although the adequacy of the evidence of concert was not an issue reviewed by the Supreme Court, in an extensive *dictum* it expressed the view that the common course of conduct was sufficient to warrant the finding of 'a unity of purpose or a common design.' " 328 U.S. at 810. (Emphasis added herein).

aimed at disparaging Impro." (A-20). The Circuit Court failed to heed its own statement about an "*implicit* charge" (emphasis added herein). (A-20). Dr. Herrick was a leader in his field. His long-time anti-competitive activities both written and spoken, were widely disseminated and well-known throughout the industry in which the corporate defendants were actively engaged. Certainly, there is enough of a record in this case to get a jury to legitimately infer or imply a conspiracy. It is interesting that the breach of the restrictive contract between Dr. Herrick and the corporate defendant Upjohn was simply noted (footnote 3) by the Circuit Court but not given any weight as a factual inference bearing on the existence of the conspiracy. (A-5). Dr. Herrick didn't consider that provision restrictive on his dealings with the other corporate defendants because he was operating within a community of interest of the corporate defendants to beat down and destroy Petitioner as a competitor.

The promotion/disparagement activities of Dr. Herrick conflicted directly with the job duties described for such extension service personnel, by Charles E. Donhowe, Dean of Extension and Director of the Cooperative Extension Service at Iowa State University. Donhowe Dep. 73-74, 76. Also, his receipt of compensation for promoting products contravened the regulations of said Extension Service. The record contains conflict in testimony between Dr. Herrick and the corporate defendants as to the number of days per year worked for each. Although Dr. Herrick was paid out of the budget of the sales department of corporate defendant, Philips Roxane, the head of the sales department had no contact with him and no authority to discharge him. His contacts were with the president, who couldn't explain his function. Thompson Dep.

222-227. In short, the record is replete with such factual examples from which conspiratorial activity could be found by a jury.[10]

This Court summarily reversed a lower court decision which had granted a motion for summary judgment in favor of the defendants where the record disclosed evidence that the defendants had followed similar exclusionary practices. *Norfolk Monument Co. vs. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

CONCLUSION

This case presents a vehicle for this Court to settle several important overall questions of federal antitrust law, repeated here for emphasis as follows:

1. Is a hub-and-spoke civil conspiracy within the Sherman Act?

2. Does this Court still allow proof of conspiracy by inference and if so, then what is the standard of proof today and is there a distinction of proof required, depending on the underlying antitrust policy sought to be enforced?

3. Is there a distinction between the proof required to establish concerted action under the Sherman Act and the civil procedure requirement for joinder of multiple conspiracies?

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[10] "It must be recognized that whether a conspiracy exists is essentially a question of fact, and the appellate courts have exhibited considerable reluctance to set aside such a finding by a jury or trial court." A.B.A., *Antitrust Law Developments*, (1975) at page 37. "A conspiracy must be judged by its constituent parts and the *jury* must look at the alleged conspiracy in its totality. A conspiracy may be implied by a course of conduct and other circumstantial evidence." *Cackling Acres, Inc. vs. Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976).

4. Was the granting of summary judgment here a correct application of this Court's holding in *Poller*; and other cases such as *First Nat. Bank of Arizona*?

5. Was there "trial by affidavit" in derogation of Petitioner's Constitutional right to a jury trial within due process?

Affirmatively cutting across numbers two through five of the above questions, it is clear that there was a sufficient record containing an abundance of material facts presenting questions for a jury to decide whether or not a conspiracy had been proven if not directly, then at least by inference.

The oft-quoted statement by Mr. Justice Clark in *Theatre Enterprises, Inc. vs. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954) that, " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely," can be turned around in this case and it is hoped that this Court will now add that *summary judgment has not yet read conspiracy out of the Sherman Act entirely.*

For the foregoing reasons, a writ of certiorari should be issued.

Dated: December 14, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2124

IMPRO PRODUCTS, INC., a Minnesota corporation,

Appellant,

v.

JOHN B. HERRICK; BABSON BROTHERS, CO., an Illinois corporation; RICHARDSON, MEYER and DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

Submitted: June 13, 1983
Filed: August 11, 1983

Before HEANEY, Circuit Judge, and HENLEY and BROWN,* Senior Circuit Judges.

HEANEY, Circuit Judge.

Impro Products, Inc., appeals from a district court order granting summary judgment in favor of the defendants on

* The Honorable BAILEY BROWN, United States Senior Circuit Judge for the Sixth Circuit, sitting by designation.

Impro's claims under Sections 1 and 2 of the Sherman Act. The court found no evidence that any of the defendants had conspired to suppress Impro as a competitor in the animal health field. We affirm.

I.

BACKGROUND

A. THE INDUSTRY STRUCTURE

Antibiotics are used in the animal health industry to treat specific illnesses, and to serve as a health maintenance additive in animal feed. Because antibiotics are drugs within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. § 321, they are subject to regulation by the federal Food and Drug Administration (FDA). This regulation extends both to drugs marketed in interstate commerce, and to those marketed in intrastate commerce which contain components that have been shipped interstate.

Animal biologics are products prepared from animal tissues or fluids, or from microorganisms, and are used to prevent or treat disease in animals. Pursuant to the Virus, Serum and Toxin Act of 1913, 21 U.S.C. §§ 151 *et seq.*, the United States Department of Agriculture (USDA) regulates animal biologics distributed in interstate commerce. *Grand Laboratories, Inc. v. Harris*, 660 F.2d 1288, 1289 (8th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Animal biologics marketed solely in intrastate commerce, however, are subject to regulation by the states, if they choose to exercise such authority, and by the FDA pursuant to the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq. See Grand Laboratories, Inc. v. Harris, supra*, 660 F.2d at 1289-1292.

The significance of these separate federal regulatory schemes is as follows: Antibiotic drugs can be marketed—either interstate or intrastate—only after they have been

tested and approved by the FDA. Similarly, animal biologics can be sold in interstate commerce only if they have been licensed by the USDA. Animal biologics, however, can be marketed on an intrastate basis without a USDA license, but they are subject to FDA review. *See Grand Laboratories, Inc. v. Harris, supra,* 660 F.2d at 1290-1292; *id.* at 1293-1295 (Heaney, J., dissenting).

B. THE PLAINTIFF

Impro Products, Inc., is a Minnesota corporation with its principal place of business in Waukon, Iowa. It produces and markets a variety of animal biologics containing whey antibodies.[1] It classifies its products into three categories: (1) food supplements which are intended to increase milk production in dairy cattle and which are marketed in interstate commerce; (2) whey blends which are intended to prevent and control infections in animals and which are marketed on an intrastate basis; and (3) teat dips (containing no whey antibodies) which are sold in interstate commerce.

C. DEFENDANT HERRICK

Dr. John Herrick, during the events in question here, was a USDA extension veterinarian, and a tenured professor of veterinary science at Iowa State University. He is a past president of the American Veterinary Medical Association

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[1] Impro states that the basic theory behind its products is that milk from dairy cattle contains certain protective factors which have immunological properties. According to the plaintiff, the USDA suggested in a 1966 report that the plaintiff utilize the name "whey antibody blends" to describe its products because at the time the agency believed that antibodies contained in the milk were the active protective factors. Impro now states that subsequent research has led scientists to think that nonspecific protective factors in the milk, rather than antibodies, might create the products' possible immunological effect.

and has been a member of many veterinary groups, farm organizations and industry associations.

Dr. Herrick's primary function as a USDA extension veterinarian on the Iowa State University staff was to accumulate information on current developments and problems in the animal health care field and to disseminate that information to farmers, government officials, veterinarians, academicians and industry representatives in the animal health field.

Between 1966 and 1976, Dr. Herrick entered into consulting arrangements with each of the corporate defendants. None of them, however, knew that Dr. Herrick had similar consulting arrangements with the other corporate defendants until this lawsuit was filed. Between November, 1959, and the spring of 1962, Dr. Herrick also was in communication with Impro officials concerning the use, efficacy and commercial possibilities of Impro's products. Impro contends that Dr. Herrick ceased rendering any assistance to the company after it refused his request in 1962 for a monthly consulting fee of $100. Dr. Herrick denies making such a request.

D. THE CORPORATE DEFENDANTS[2]

1. Babson Brothers Company

Babson is an Illinois corporation with its principal place of business in Oakton, Illinois. It markets milking equipment, related dairy supplies, and teat dips. It does not manufacture or distribute any antibiotics, vaccines or serums. Babson retained Dr. Herrick beginning in 1976 to author a column in its publication *Dairy Illustrated*, to author a book on milking principles, to be available for speaking engagements and

[2] Two other corporate defendants, Diamond Laboratories, Inc. and G. D. Searle & Co., entered into settlements with Impro prior to the district court's order granting summary judgment in favor of the remaining defendants.

meetings, and to otherwise act as a consultant for the company. Babson paid Dr. Herrick a monthly fee of $500, plus travel expenses.

2. Richardson, Meyers and Donofrio, Inc. (RM&D)

RM&D is a Baltimore-based advertising agency which includes among its clients American Cyanamid Company, a manufacturer and seller of livestock health products, including antibiotics. RM&D prepares printed advertisements in farm media and veterinary journals for American Cyanamid. RM&D retained Dr. Herrick beginning in 1975 to provide it with general information relating to the animal health economy, management trends, new products, new ideas and problem areas. In return, RM&D paid Dr. Herrick an annual fee of $10,000 for which American Cyanamid reimbursed RM&D.

3. Upjohn Company

Upjohn is a Delaware pharmaceutical corporation with its principal place of business in Chicago. It markets antibiotic drugs for animal health care. Upjohn began retaining Dr. Herrick in 1966 to provide its marketing staff with information concerning trends in the livestock health industry and competing products.[3] Upjohn paid Dr. Herrick $1,500 per year for his duties. Upjohn also has participated in trade organizations and sponsored university research relating to the animal health care industry.

4. Philips Roxane, Inc.

Philips Roxane is a Delaware corporation with its principal place of business in St. Joseph, Missouri. It sells a variety of animal health products, including antibiotics, biologics, teat dips, insecticides and instruments. Dr. Herrick

[3] Upjohn's contracts with Herrick required him to keep their agreements confidential and to obtain the company's approval before consulting for other firms in the animal health field. Herrick breached this latter obligation.

began consulting for Philips Roxane in the mid-to-late 1960s. His duties included providing information on recent developments and problems in the animal health field, appearing at press conferences and meetings concerning the company's products, and providing answers to inquiries from Philips Roxane's technical marketing and sales staffs. In return, Philips Roxane provided Dr. Herrick with an automobile and reimbursed his automobile expenses. Philips Roxane also has participated in trade organizations and sponsored university research in the animal health field.

E. COMPETITION BETWEEN IMPRO AND THE CORPORATE DEFENDANTS

According to Impro, its intrastate biological products are in competition with the antibiotic drugs produced by the corporate defendants (or in the case of RM&D, the antibiotics produced by its client American Cyanamid).[4] Impro contends that its products are effective in increasing milk production, and in preventing or controlling infections, and that its products do not produce the adverse side effects—primarily the creation of resistant bacteria and the existence of antibiotic residues in meat and dairy products—caused by antibiotic drugs.

Impro further asserts that the corporate defendants entered into a single conspiracy or several conspiracies with Dr. Herrick—under the guise of consulting agreements—to destroy Impro or to limit its effectiveness as a competitor. Its

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[4] Impro places primary importance on the competition between its biologics and the antibiotics sold by the various corporate defendants. We note, however, that Impro, as an intrastate biologics company, competes with the federally-licensed biologics which Phillips Roxane sells on an interstate basis. Moreover, Impro competes with Babson in the sale of teat dips. Babson sells neither antibiotic drugs nor animal biologics.

theory is that in return for compensation from the corporate defendants, Dr. Herrick used his various positions to promote the products of the corporate defendants, to disparage Impro's products, and to influence various federal and state governmental officials to deny Impro necessary licensing for its products.

The corporate defendants deny that any of them entered into a conspiracy with Dr. Herrick to suppress Impro as an effective competitor in the animal health field. They contend that there would be no reason for any of them to enter into such an agreement because Impro's biologics do not compete with their products and because there is no adequate scientific data indicating that Impro's products are efficacious. They additionally assert that Dr. Herrick's comments with respect to the products of Impro and the corporate defendants were legitimately and independently made in the course of his duties as an extension veterinarian and professor.

F. THE PRESENT LITIGATION

In October, 1978, Impro filed an amended complaint alleging that the defendants had conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and to monopolize trade in violation of Section 2 of the Act, 15 U.S.C. § 2, by disparaging Impro and its new and innovative animal health products.[5] Impro also included in its amended complaint several pendent state law claims.

On August 8, 1979, the district court denied the defendants' motion to dismiss and ordered the parties to proceed with

[5] As the district court recognized, Impro's section 2 claim is a "market structure" claim, rather than a "market share" claim, because it, like the section 1 claim, is premised on a conspiracy theory. Thus, the issue presented in both Impro's section 1 and section 2 claims is whether concerted action existed among any of the defendants.

discovery on Impro's amended complaint. That discovery continued for three years.

On August 17, 1982, the district court granted summary judgment in favor of the defendants on Impro's Sherman Act claims because it found no evidence of concerted action to restrain trade or to monopolize among the corporate defendants or between Dr. Herrick and any of the corporate defendants.[6] On October 19, 1982, the district court denied the plaintiff's motion for reconsideration. Impro appeals to this Court.

II.

THE SUMMARY JUDGMENT STANDARD

Summary judgment is justified only when, viewing the facts and inferences that may be derived therefrom in the light most favorable to the nonmoving party, the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). Here, the critical question is whether a jury reasonably could infer from certain evidence that Dr. Herrick and one or more of the corporate defendants entered into an agreement or agreements to harm Impro. In *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978), we articulated the following standards for drawing such inferences:

> The plaintiffs were not required to directly prove the fact of an agreement * * *. Evidence from which an agreement could be inferred is sufficient. * * * However, to avoid [summary judgment] "the facts and circum-

[6] Because the district court granted summary judgment against Impro's Sherman Act claims and because complete diversity of citizenship did not exist between the plaintiff and the defendants, the district court also dismissed Impro's state law causes of action for lack of jurisdiction.

stances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion." * * * Furthermore, an inference which a jury is entitled to draw must be based upon proven facts and not upon other inferences. (Citations omitted).[7]

III.

DISCUSSION

Impro has been plagued from the inception of this case by its inability to decide on its theory of antitrust liability. Impro's complaint and supporting documents appear to allege three possible conspiracies: (1) a single, overall horizontal conspiracy among all the defendants; (2) a single hub-and-spoke conspiracy in which each corporate defendant conspired separately with Dr. Herrick, but did not conspire among themselves; and (3) multiple vertical conspiracies between each corporate defendant and Dr. Herrick with no knowledge on the part of any corporation that others might be involved in similar schemes. On appeal, we need address only the latter two theories because Impro has not appealed from the district court's finding that there was no evidence of a single, horizontal conspiracy among all the defendants.

A. THE CONSPIRACY CLAIM

A threshold question is whether Impro has alleged a cause of action that is a cognizable conspiracy to restrain trade or conspiracy to monopolize under Sections 1 and 2, respectively, of the Sherman Act. The district court answered this question in the affirmative, and we agree. When an established producer of conventional products enters into a conspiracy to

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[7] *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978), involved a motion for directed verdict, but its discussion of inferences is equally applicable to a motion for summary judgment.

suppress a competitor's new and innovative product, that conspiracy will give rise to liability under sections 1 and 2—assuming all of the other elements of the causes of action under those sections are present.[8] *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (nonprofit engineers' society violated Section 1 of the Sherman Act when a chairman of one of its subcommittees improperly issued a letter casting doubt on the safety and efficacy of an innovative new product manufactured by Hydrolevel—a recent market entrant—and the subcommittee chairman acted at the behest of an established firm in competition with Hydrolevel); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), *cert. denied*, 459 U.S. 1063 (1980) (airline violated Sections 1 and 2 of the Sherman Act by conducting a campaign—including false and deceptive advertising—to prevent travel group charters from becoming a competitive threat to its regularly scheduled air service); *McDonald v. Johnson & Johnson*, 537 F. Supp. 1282 (D. Minn. 1982), *appeal docketed*, No. 82-1594 (8th Cir. May 17, 1982) (major health care company violated Sections 1 and 2 of the Sherman Act by purchasing producer of innovative pain-killing device to suppress it as a competitor of the defendant's drug products).

B. THE CONCERTED ACTION REQUIREMENT

The next question is whether Impro has introduced sufficient evidence with respect to each of the elements of its conspiracy claims under Sections 1 and 2 of the Sherman Act to avoid summary judgment. Although both sections prohibit

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[8] Whether a rule of reason or *per se* analysis is applicable to such a claim depends, of course, on the type of conduct in which the defendants engage in furtherance of their conspiracy or conspiracies.

conspiracies, they apply to different conduct: section 1 proscribes conspiracies in restraint of trade; section 2 proscribes conspiracies to monopolize. 15 U.S.C. §§ 1 and 2. Consequently, the elements of proof for a cause of action under each section are not identical. *See* 2 Von Kalinowski, Antitrust Laws and Trade Regulation § 6.01 (1982) (hereafter "Von Kalinowski"); 3 Von Kalinowski, *supra*, at § 9.02. Both sections, however, require proof of concerted action. *Id.*

The concerted action requirement requires a finding that two or more persons entered into either an express or implied agreement. *Admiral Theatre Corp. v. Douglas Theatre Co.*, *supra*, 585 F.2d at 884; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-109 (2d Cir. 1975). The conspiracy provisions of sections 1 and 2 do not prohibit independent business actions or decisions by individuals. *Id.* Moreover, to satisfy the concerted action requirement, the plaintiff must demonstrate that the defendants shared a "unity of purpose or a common design and understanding, or a meeting of the minds" to engage in the conduct prohibited by the Sherman Act. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). *See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213-214 (1951); 2 Von Kalinowski, *supra*, at § 6.01; 3 Von Kalinowski, *supra*, at § 9.02.

We turn first to the concerted action issues presented by Impro's theory that a separate vertical conspiracy existed

between Dr. Herrick and each corporate defendant.[9] The district court granted summary judgment in favor of the defendants because it found no evidence showing that Dr. Herrick and any of the corporate defendants engaged in concerted action to harm Impro.

The plaintiff argues that it introduced evidence which reasonably supports an inference that Dr. Herrick and each of the corporate defendants entered into an agreement to suppress Impro as a viable competitor in the animal health industry, and that this evidence precludes summary judgment.

Impro relies primarily on three factors in support of this contention: First, the plaintiff's teat dips and biological

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[9] With respect to Impro's theory of multiple vertical conspiracies, the defendants argue that Dr. Herrick cannot be found to have conspired, within the meaning of the Sherman Act, with each corporate defendant which retained him as a consultant. We disagree. In *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 469-470 (1962), the Supreme Court held that a management consultant may be found to have conspired with his principal firm if the consultant has an independant economic interest in the alleged restraint of trade. Impro's pleadings and evidence demonstrate—at least for summary judgment purposes—that Dr. Herrick may have had an independent interest in engaging in activities to suppress Impro as an effective competitor in the animal health field. His position as a consulting veterinarian in the animal health field will be enhanced if his views concerning intrastate biologics are proven to be sound and correspondingly, that position will be weakened if his views are proven to be incorrect. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (engineers' society—which, like Dr. Herrick here, accumulates and disseminates information as its primary function—violated Section 1 of the Sherman Act when one of its members issued a letter wrongfully disparaging the new product of Hydrolevel—a recent market entrant—and that member's conduct was undertaken upon the urging of an established firm in competition with Hydrolevel). *See also* Note, *"Conspiring Entities" under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 676-682 (1982).

products compete with the antibiotics, biologics and teat dips sold by the various corporate defendants (or in the case of RM&D, sold by its client American Cyanamid) in an overall animal health market. Impro urges that this competition provided the motive for the defendants to conspire against the plaintiff.

Second, each of the corporate defendants entered into an agreement with Dr. Herrick under which Herrick received a substantial consulting fee. Impro contends that these arrangements provide both circumstantial evidence of an opportunity to conspire and direct evidence of agreements between Dr. Herrick and each corporate defendant.

Third, the various defendants engaged in activities which were harmful to the plaintiff. Impro claims that these activities are consistent with the inference of concerted action to harm it which is raised by the evidence of motive and opportunity to conspire.

Impro introduced evidence indicating that the following activities may have occurred:[10] First, Dr. Herrick used his position as a USDA veterinarian and an Iowa State University professor to actively promote the products of the corporate defendants and to disparage those sold by Impro when speaking to or writing for farmers, veterinarians, academicians, and others in the animal health field. For example, Dr. Herrick's articles in *Dairy Illustrated*, a Babson publication, contained favorable comments about products sold by Babson, Philips Roxane, and RM&D's client, American Cyanamid. In addition, Dr. Herrick appeared at a Philips Roxane press conference at which it introduced a new product—Somnugen—

[10] Because we are reviewing a grant of summary judgment against the plaintiff, we relate the facts which follow in the light most favorable to Impro and give it the benefit of all reasonable inferences drawn from the record.

and subsequently worked to promote this product, including publishing a favorable article in a farm-oriented magazine and helping Philips Roxane refute charges that Somnugen contributed to bovine respiratory disease. Dr. Herrick also prepared an article in 1977 for a publication entitled "Animal Nutrition and Health," which stressed the alleged hazards of intrastate biologic products.

Second, Dr. Herrick made various efforts to prevent the company from obtaining federal and state licenses to market its products. For example, when the USDA announced in 1966 that it intended to issue Impro a federal license to market its biologics in interstate commerce, Dr. Herrick contacted a colleague at Iowa State University, Dr. Voelker, who in turn contacted Dr. Plowman from the USDA Agricultural Research Service, to persuade the USDA not to issue such an interstate license to Impro. The Agricultural Research Service thereafter initiated an investigation—the so-called Beltsville test—to determine the efficacy of Impro's biologic products. Before this test was commenced, Dr. Herrick contacted Dr. Plowman, who was conducting the test, and Dr. Hejl, the director of the USDA Extension Service in Washington, D.C., to object to Impro's products. Subsequently, the USDA revoked Impro's six-month interim license to market its products and to conduct research in a four state area. After the USDA finished the Beltsville test, it issued a report which generally concluded that Impro's products were not effective. Thereafter, the American Veterinary Medical Association, at the urging of its president Dr. Herrick, published the results of the Beltsville test in its scientific journal.

In 1976, Dr. Herrick worked on proposed state legislation in Iowa intended to restrict the use of intrastate biologics. Herrick also told an official from Grand Laboratories—a

competing intrastate biologics producer—that the legislation was aimed at Impro, not Grand Laboratories. In addition, Dr. Herrick also provided information about Impro to officials from other states—including Minnesota, Michigan, Vermont and California—who were investigating the plaintiff's products.

Dr. Herrick wrote to USDA officials at various times in 1971, 1975, 1976, and 1977 to encourage the agency to scrutinize the efficacy of Impro's biological products and to be aware of possible unlicensed interstate sales. In 1976, USDA and FDA officials began investigating Impro for possible violations of the Virus, Serum and Toxin Act, 21 U.S.C. §§ 151 *et seq.* At various times throughout the investigation, which continued through 1978, officials at these two agencies contacted Dr. Herrick to discuss Impro and its products.

Third, certain of the corporate defendants also engaged in conduct harmful to Impro by participating in trade associations and sponsoring university research which were generally hostile to the plaintiff's products. For example, Philips Roxane and American Cyanamid are members of the American Health Institute—a trade association of federally licensed producers of animal health products—and specifically they are members of the Institute's Veterinary Biologics Licensees committee. The committee has engaged in litigation, congressional and executive lobbying and public information activities aimed at stopping the growth in sale of intrastate biologics.

Similarly, Philips Roxane, Babson and Upjohn are members of the National Mastitis Council, which is an organization comprised of governmental officials, industry representatives, veterinarians and university researchers. The council's public information programs have promoted the use of anti-

biotic drugs for preventing and treating mastitis, and they have reported that there is no evidence to support the use of whey antibodies or similar biologics for these health care purposes. Moreover, Babson was instrumental in founding the council and Upjohn has given research grants to four of the five nongovernmental scientists on the council's mastitis publication writing committee.

Babson, Philips Roxane, and Upjohn have contributed funds to university research. For example, Dr. Robert Bushnell, a USDA extension veterinarian at the University of California at Davis, received research grants from Upjohn and consulting fees from Babson. Thereafter, Dr. Bushnell contacted the California Department of Agriculture, urging it to take action against Impro. Similarly, in 1975 through 1978, Dr. Roger Mellenberger, a USDA extension dairyman at Michigan State University, sent letters and contacted public officials to urge the Michigan Department of Agriculture to revoke Impro's state commercial feed license. During this time, Upjohn was paying research grants to Dr. Mellenberger.

In summary, the plaintiff argues that evidence indicating that the various defendants had a motive and opportunity to conspire, combined with evidence that certain of the defendants engaged in conduct injurious to Impro, reasonably supports an inference that Dr. Herrick and each corporate defendant engaged in concerted action to harm Impro. This inference, argues the plaintiff, is sufficient to create a question of fact as to whether there was the requisite concerted action in this case. We disagree.

As an initial matter, we emphasize again that to satisfy the concerted action requirement, the plaintiff must show more than the fact that Dr. Herrick entered into an agreement with each corporate defendant under which he received

a substantial sum of money. The plaintiff must show that for each alleged separate vertical conspiracy, Dr. Herrick and a corporate defendant *knowingly* participated in an arrangement *with an intent to suppress* Impro as a competitor. *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 884. *See* 2 Von Kalinowski, *supra,* at § 6.01[3]; 3 Von Kalinowski, *supra,* at § 9.02[2] & [5].

Although the circumstantial evidence introduced by the plaintiff is relevant to the question of whether concerted action exists, *see Poller v. Columbia Broadcasting System,* 368 U.S. 464, 469-474 (1962), it is not sufficient to raise a material question of fact with respect to whether there was the requisite concerted action between Dr. Herrick and any of the corporate defendants. *See, e.g., Weit v. Continental Illinois National Bank & Trust Co.,* 641 F.2d 457, 462-468 (7th Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra,* 513 F.2d at 109-114. The district court found that the record rebuts any possible inference of concerted action raised by Impro's circumstantial evidence. It stated:

> The alleged conspiracy agreement has been denied under oath by Herrick and all the officers and employees of the corporate defendants who have been deposed or given affidavits. All deny under oath that Impro and its products were even mentioned between or among any of them. No direct evidence to the contrary has been found. The sworn testimony of all concerned establishes without contradiction that none of the corporate defendants even knew that Herrick had consulting agreements with any of the other corporate defendants. And although a theoretic competitive motive to conspire existed for all defendants except RM&D, and opportunity to conspire

existed for all defendants, the well established requisites for an inference of conspiracy from parallel conduct are not fulfilled by the record.

Defendants have shown by the uncontradicted sworn testimony of Herrick and the corporate defendants' officers and employees that the consulting agreements are not susceptible of plaintiff's conspiracy interpretation, and plaintiff has failed to meet its obligation of producing evidence supporting the conspiracy inference urged by it. As a result, plaintiff must suffer summary judgment dismissing its complaint.

We agree with this analysis.

The consulting agreements between Dr. Herrick and the various corporate defendants obviously had a legitimate business purpose. Standing alone they do not evince knowing participation by any of the corporate defendants in an arrangement with Dr. Herrick to harm Impro. Notwithstanding extended discovery,[11] however, Impro has not uncovered any

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[11] The parties engaged in massive discovery. They deposed 103 persons (98 by the plaintiff), and many were questioned multiple times. The parties also exchanged thirty-two sets of interrogatories, thirteen sets of requests for admissions, and twenty-eight sets of requests for production of documents. This discovery period lasted for over three years and produced over 23,000 pages of transcripts and thousands of documents.

In addition, Impro directed requests to governmental agencies, including the USDA and FDA, under federal and state freedom of information acts. Impro also conducted investigations and deposed personnel from certain trade organizations and universities—including the American Dairy Science Association, Animal Health Institute, National Mastitis Council, Iowa State University, University of Minnesota, Michigan State University, and University of California at Davis. Moreover, some of the discovery materials used by Impro—over the defendants' objections—were obtained in two other lawsuits related to this one. *Impro Products, Inc. v. Block*, No. 81-1284 (D. D.C. Sept. 2, 1982), *appeal docketed*, No. 82-24-47 (D.C. Cir. Dec. 7, 1982), and *Impro Products, Inc. v. American Dairy Science Association*, No. 4-81-74 (D. Minn. filed Feb. 12, 1981).

evidence that any of the agreements, in fact, represented a *quid pro quo* for Dr. Herrick's disparaging comments about Impro.

Nor was the plaintiff able to introduce any other evidence showing a connection between Dr. Herrick's activities and any of the corporate defendants. Uncontradicted testimony established that no employees of the corporate defendants (nor RM&D's client American Cyanamid) ever discussed Impro or its products with Dr. Herrick before this litigation was commenced.[12] Indeed, with a very few minor exceptions, no employees at any of the corporate defendants or American Cyanamid had ever even heard of Impro or its products prior to this lawsuit.

No one at RM&D had heard of Impro or its products prior to this litigation. At Upjohn, four veterinarians were familiar with Impro's name from their previous positions with the USDA, but they did not discuss the plaintiff with anyone at Upjohn. None of the Upjohn employees responsible for hiring or retaining Dr. Herrick had ever heard of Impro or its products. Two Philips Roxane vice presidents had seen Impro's products advertised before this lawsuit, but their uncontradicted testimony was that Impro was never discussed in any

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[12] The district court found that in 1977, Philips Roxane sent to the USDA's Biologic Licensing and Standards Division copies of advertising by Impro and Grand Laboratories, and inquired as to whether interstate advertising of intrastate biologics is lawful. Thereafter, the USDA ordered that this advertising be withdrawn from circulation. There is no evidence that Dr. Herrick knew of Philips Roxane's letter. Moreover, Philips Roxane's conduct in writing the letter to the USDA plainly was protected from antitrust liability by the *Noerr-Pennington* doctrine, which exempts from the antitrust laws any legitimate use of the political process by private persons to obtain legislative or executive action. *See Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 746-747 (8th Cir. 1982), cert. denied, 103 S. Ct. 2122 (1983).

company meeting that they attended. Philips Roxane's president has been with the company since 1960 and has been actively involved in assessing competition, but he had never heard of Impro before this lawsuit was filed.

In addition, there is no evidence that any corporate defendant was aware of Dr. Herrick's actions about which Impro complains most bitterly: his alleged efforts to influence state and federal agencies to scrutinize the efficacy of Impro's products, to deny the plaintiff the required licenses to sell its products, and to investigate Impro for unlicensed sales.

Furthermore, there is no evidence in some 23,000 pages of testimony or in the thousands of documents introduced by the parties that any of the corporate defendants gave Dr. Herrick an explicit or implicit charge to promote their products or to attack those sold by their competitors. Nor is there record evidence that the corporate defendants were aware of Dr. Herrick's activities aimed at disparaging Impro. Rather, each corporate defendant retained Dr. Herrick to perform relatively specific duties—generally aimed at providing the company with information or new developments in the animal health field. We cannot assume, without evidence, that Dr. Herrick's consulting duties included harming Impro. The "[a]uthority to do illegal or tortious acts * * * is not readily inferred." *Harlem River Consumer's Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1271 (S.D. N.Y. 1976), *quoting*, Restatement (Second) of Agency § 34, comment d (1958).

Notwithstanding the foregoing, Impro urges that a jury reasonably could infer that the various corporate defendants and Dr. Herrick entered into agreements to harm Impro because of the alleged anticompetitive activities which occurred. Impro ignores the fact that the activities in question occurred

over a very long period of time—nearly twenty years—and they were relatively few in number. In fact, most of the incidents about which Impro complains—particularly Dr. Herrick's alleged efforts to influence state and federal licensing officials—happened well before Babson and RM&D retained Herrick in 1976 and 1975 respectively. *See* slip op., *supra*, at 4-5.

Moreover, it is clear from the record that Dr. Herrick's duties as a USDA extension veterinarian obligated him to speak out, at least on occasion, with respect to various types and brands of animal health products. It may well be that Dr. Herrick acted unethically or unwisely in concealing the fact that he was receiving payments from the corporate defendants when he extolled their products and criticized those sold by Impro; but this conduct cannot serve as the basis for an antitrust action.

Impro also exphasizes that certain of the corporate defendants—Philips Roxane, Upjohn and Babson—as well as American Cyanamid and Dr. Herrick, were members of trade organizations which allegedly sought to prevent the sale of intrastate biologics such as those made by Impro. The district court, however, found that the organizations primarily involved, the Animal Health Institute and the National Mastitis Council, "serve the customary legitimate purpose of trade organizations, and that participation in the trade organizations by Herrick and [the] corporate defendants is wholly consistent with their professional and business interests." There is no contrary evidence in the record.

Similarly, Impro points to the evidence that Philips Roxane, Upjohn and Babson also sponsored university research which produced results critical of Impro's products and similar biologics. The district court found that "funding by corpora-

tions of university research in areas of their field of commerce is commonplace and wholly consistent with their business interests." There is no record evidence here showing that the contributions in question were made for any other purpose.

These findings demonstrate that there was no "unity of purpose or a common designated understanding, or a meeting of the minds" between Dr. Herrick and any of the corporate defendants aimed at suppressing Impro as a competitor in the animal health field. *See American Tobacco Co. v. United States, supra,* 328 U.S. at 810. The evidence simply failed to show that any of the corporate defendants knowingly entered into an arrangement with Dr. Herrick under which he would promote their products and disparage those sold by Impro. *See Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 884. The only conclusion that can be drawn from the record here is that the activities engaged in by Dr. Herrick which may have harmed Impro were of his own volition and not the result of some unlawful agreement. Similarly, the alleged anticompetitive acts committed by the corporate defendants were the result of individual business decisions.

In the face of this uncontradicted evidence introduced by the defendants, the district court properly concluded that Impro's circumstantial evidence of motive and opportunity to conspire was not reasonably susceptible to the interpretation it sought to give that evidence. Consequently, Impro was obligated to show the existence of probative evidence supporting the inference of concerted action which it urged, or face summary judgment. *See First National Bank v. Cities Service Co.,* 391 U.S. 253, 288-290 (1968); *Weit v. Continental Illinois National Bank & Trust Co., supra,* 641 F.2d at 462-468. But the plaintiff's only response to the defendants' evidence has been expressions of disbelief and challenges to the

credibility of the defendants' witnesses.[13] Such efforts are not sufficient to defeat a motion for summary judgment. As the Second Circuit has noted, "[i]f the most that can be hoped for is the discrediting of the defendants' denials, no question of material fact is presented." *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra,* 513 F.2d at 110.

To conclude, concerted action may be proven by inferences drawn from the defendants' conduct; but the circumstances shown must lead to "the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion." *Admiral Theatre Corp. v. Douglas Theatre Co.,* 437 F. Supp. 1268, 1286 (D. Neb. 1977), *aff'd,* 585 F.2d 877 (8th Cir. 1978), *quoting, Wesson v. United States,* 172 F.2d 931, 933 (8th Cir. 1949). Although this record may raise questions with respect to Dr. Herrick's judgment, it does not contain any evidence which reasonably will support an inference that any of the corporate defendants entered into an agreement with Dr. Herrick in-

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[13] For example, when Impro's former president, Robert Collins, was asked to explain the facts on which he believed Philips Roxane was aware of Dr. Herrick's activities, despite the company's denials, Collins stated:

> They must have been aware of it or else they wouldn't have paid him. It's obvious to me. I don't have the facts that they were aware of who they were hiring and what they were doing, but they're an efficient company. They must know what their people are doing or else they couldn't stay in business. Now that's just a fact, that they're an efficient company and have competent personnel, so when they hire someone and pay them a considerable amount of money, they must know what he's doing.

Similarly, Mr. Collins testified:

> Q. Mr. Collins, on what facts do you base your statement that you are sure that Philips Roxane considers IMPRO a threat?
>
> A. They have competent people.

tended to suppress Impro as a competitor. Accordingly, the district court properly granted summary judgment against Impro's section 1 and 2 claims based on a theory of multiple vertical conspiracies.

The plaintiff alternatively contends that the record evinces a hub-and-spoke or rimless wheel conspiracy in which each corporate defendant entered into a separate agreement with Dr. Herrick to harm Impro and each was aware that it was part of a larger scheme, but there was no overall agreement among all of the defendants.

In *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972), the Sixth Circuit articulated the following test for establishing a hub-and-spoke conspiracy in an antitrust context:[14]

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[14] There is some question whether the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a hub-and-spoke conspiracy. We believe that they do. Two federal courts addressing this question have recognized—at least implicitly—that such a conspiracy is cognizable under the Sherman Act if the plaintiff introduces sufficient evidence to demonstrate that one exists. *See Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972); *Harlem River Consumer Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1279 (S.D. N.Y. 1976). Moreover, in *Kotteakos v. United States*, 328 U.S. 750 (1946), when the Supreme Court first recognized that in certain circumstances criminal defendants can be jointly tried on a hub-and-spoke conspiracy theory, it indicated that such a theory might be used in a civil case even though it may not be appropriate in a criminal case.

Because Impro's evidence is insufficient to sustain a hub-and-spoke conspiracy theory, we need not determine whether it properly could be utilized in this case. *See United States v. Jackson*, 696 F.2d 578, 586-587 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1531 (1983) (various spoke conspirators cannot be tried together in a criminal case when they would suffer "from unwarranted imputation for others' guilt"). (Citation omitted).

> (1) that there is an *overall*-unlawful plan or "common design" in existence; (2) that knowledge that others must be involved is inferable to each member because of his knowledge of the unlawful nature of the subject of the conspiracy but knowledge on the part of each member of the exact scope of the operation or the number of people involved is not required, and (3) there must be a showing of each alleged member's participation. (Emphasis in original).

It is clear that the district court did not err in granting summary judgment in favor of the defendants on the plaintiff's hub-and-spoke conspiracy theory.[15] First, the third requirement of the *Elder-Beerman* test is the existence of a separate unlawful agreement between each spoke conspirator and the hub conspirator. As we detailed above, the record shows that no agreement to harm Impro existed between any of the corporate defendants and Dr. Herrick.

Second, the record shows that none of the corporate defendants communicated with any of the others concerning Impro or its products until after the plaintiff commenced this lawsuit, and that none of the corporate defendants knew that Herrick had consulting agreements with any of the other corporate defendants. This evidence—combined with the district court's findings that none of the corporate defendants had entered into an agreement with Dr. Herrick to disparage

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[15] Impro appears to contend that the district court did not rule on its hub-and-spoke conspiracy theory. We cannot agree. In its motion for reconsideration, Impro explicitly urged that the district court had failed to consider the hub-and-spoke conspiracy theory in its initial order and accompanying memorandum. Obviously, the district court was satisfied that the findings in its initial order and accompanying memorandum disposed of the plaintiff's hub-and-spoke claim.

Impro—precludes this Court from concluding, as required by the *Elder-Beerman* test, that there existed an overall plan to suppress the plaintiff as a competitor or that each defendant had knowledge that others were involved in the conspiracy. *See Elder-Beerman Corp. v. Federated Department Stores, Inc., supra,* 459 F.2d at 146-148; *Harlem River Consumer's Cooperative, Inc. v. Associated Grocers of Harlem, Inc., supra,* 408 F. Supp. at 1279-1282.

Because Impro failed to introduce evidence which at least raised a material question of fact as to whether it could satisfy the requirements of a hub-and-spoke conspiracy theory, the district court did not commit reversible error in granting summary judgment in favor of the defendants on this issue.[16]

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[16] Impro urges that the district court erred in applying the "conscious parallelism" doctrine because, contrary to the district court's view, the plaintiff did not rely on the theory that all the defendants engaged in a single, horizontal conspiracy. Impro's claim is plainly incorrect. In the proceedings below, Impro repeatedly referred to "a conspiracy among" all the defendants, "a common scheme or plan pursuant to which [the defendants] would jointly carry out activities," and other phrases to the same effect. Accordingly, the district court was fully justified in utilizing the "conscious parallelism" doctrine in an effort to place a recognized analytical framework on the plaintiff's contentions. *See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537, 540-543 (1954); *Admiral Theatre Corp. v. Douglas Theater Co., supra,* 585 F.2d at 884; *Venzie Corp. v. United States Mineral Products Co.,* 521 F.2d 1309, 1312-1316 (3d Cir. 1975). We need not address the "conscious parallelism" issue on appeal because the plaintiff does not appeal from the district court's finding that the defendants were entitled to summary judgment on Impro's horizontal conspiracy theory.

III.
CONCLUSION

For the above-stated reasons, we affirm the district court's order granting summary judgment in favor of the defendants on Impro's claims under Sections 1 and 2 of the Sherman Act.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 76-235-2
Civil No. 7?-235-2

IMPRO PRODUCTS, INC.,

Plaintiff,

v.

JOHN B. HERRICK, et al.,

Defendants.

MEMORANDUM OPINION, RULINGS AND ORDER DISMISSING COMPLAINT

Before the court for rulings are the motions of all remaining defendants[1] for summary judgment in this private antitrust action. (Trial by jury, which is estimated to last about four months, is scheduled to commence next Tuesday, August 17.)

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[1] Defendants G. D. Searle Company and Diamond Laboratories, Inc. have settled with plaintiff within the past few days and the complaint has been dismissed against them. Nevertheless, because of the nature of this case, alleged conspiracy of all the original defendants, evidence relating to these defendants will be recited and considered herein.

I. PLAINTIFF'S COMPLAINT

Plaintiff's amended complaint is in four counts, and each count seeks relief against all defendants.

Count I asserts a claim under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiff alleges that the defendants contracted, combined and/or conspired to restrain trade among the states and attempted to monopolize part of the trade among the states by having one of their number, John B. Herrick, engage in a series of acts which were designed to destroy plaintiff as a competitor of the other defendants in the livestock health products market. Plaintiff alleges that it has been damaged in the amount of ten million dollars[2] and it seeks treble damages and injunctive relief.

Count II is a pendent state law claim for tortious interference with plaintiff's business rights. Count III is a pendent state law claim that the court previously dismissed because it is redundant of Count II. Count IV is a pendent state law claim for defamation. The pendent state law claims rest on the same factual allegations that underlie the antitrust claim. Plaintiff seeks ten million dollars damages* and injunctive relief under these claims.

II. THE PARTIES

Plaintiff Impro Products, Inc. (hereinafter Impro), is a Minnesota corporation with its principal place of business in Waukon, Iowa. Impro is a closely held corporation and the Collins family members are the majority stockholders. For more than 20 years Impro has been engaged in developing and

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[2] Plaintiff recently filed a motion to amend its complaint to allege it has been damaged in the amount of one hundred million dollars, but this motion was denied by order of the Magistrate on August 5, 1982.

* See footnote 2.

marketing livestock health products that do not contain antibiotics.

Defendant John B. Herrick (hereinafter Herrick) is a resident of Ames, Iowa. He is a doctor of veterinary medicine who is very well known in the livestock health field. At all material times, he was United States Department of Agriculture Extension Veterinarian associated with Iowa State University, one of the leading centers of agricultural education in the United States, where he was a Professor of Veterinary Clinical Science at the College of Veterinary Medicine.

Defendant Diamond Laboratories, Inc.** (hereinafter Diamond) is a Delaware corporation with its principal place of business in Des Moines, Iowa. It markets livestock health products.

Defendant Babson Brothers Co. (hereinafter Babson) is an Illinois corporation with its principal place of business in Oakton, Illinois. It markets a livestock health or cosmetic product, teat dip.

Defendant G. D. Searle Company** (hereinafter Searle) is a Delaware corporation with its principal place of business in Chicago, Illinois. A subsidiary marketed livestock health products for several years.

Defendant Richardson, Meyer and Donofrio (hereinafter RM&D) is a Maryland corporation with its principal place of business in Baltimore, Maryland. It is an advertising and public relations firm that has as one of its clients American Cyanamid, which markets livestock health and feed products.

Defendant Upjohn Co. (hereinafter Upjohn) is a Delaware corporation with its principal place of business in Kalamazoo, Michigan. It markets livestock health products.

** See footnote 1.

Defendant Philips Roxane, Inc. (hereinafter Philips Roxane) is a Delaware corporation with its principal place of business in St. Joseph, Missouri. It markets livestock health products.

Diamond, Babson, Searle, RM&D, Upjohn and Philips Roxane will collectively be referred to hereinafter as "the corporate defendants."

III. THE PENDING MOTIONS

The motions for summary judgment assert various grounds. The threshold ground common to all the motions, simply stated, is that plaintiff has no evidence of a conspiracy among the defendants or any of them. This ground will be addressed first.

This threshold ground for summary judgment rests on the yield of extensive discovery that has taken place since August of 1979, when this court denied defendants' motions to dismiss Counts I, II and IV, most of it by plaintiff. Over 23,000 pages of transcript record the deposition testimony of over 100 deponents. There are thousands of pages of requests for admissions, interrogatories and answers thereto, and thousands of documents have been produced. Most of this discovery has been by plaintiff of defendants.

IV. LAW GOVERNING SUMMARY JUDGMENT

A. Generally

Part (c) of Fed. R. Civ. P. 56, the summary judgment rule, provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Part (e) of Rule 56 provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The United States Court of Appeals for the Eighth Circuit has observed:

> [Summary judgment] is an extreme and treacherous remedy, not to be entered unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances. *Equal Employment Opportunity Comm. v. Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978); 10 Wright & Miller, Federal Practice and Procedure § 2725, pp. 502-03.

Vette Co. v. The Aetna Cas. & Sur. Co., 612 F.2d 1076, 1077 (8th Cir. 1980).

The United States Supreme Court has observed in respect to motions for summary judgment that "inferences to be drawn * * * must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

B. In Antitrust Cases

The United States Court of Appeals for the Eighth Circuit recently articulated the role of summary judgment in antitrust litigation:

> Summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue.

See Poller v. Columbia Broadcasting System, 368 U.S. 464, 491, 82 S.Ct. 486, 495, 7 L.Ed.2d 458 (1962). However, summary judgment is not necessarily precluded in antitrust litigation. As noted by the Supreme Court in *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968):

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

See also Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110-12 (5th Cir. 1979). Like the district court, we must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences without assessing credibility. Only if the evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact should the case be decided by the court as a matter of law rather than be submitted to the jury. *See, e.g., Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 883 (8th Cir. 1978).

Battle v. Lubrizol Corp., 673 F.2d 984, 987 (8th Cir. 1982).

In *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288-90, the Court emphasized the obligation of the party resisting a motion for summary judgment in an antitrust case:

> It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is

required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. The case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy. What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. * * *

Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. [Footnote omitted.]

Where there has been exhaustive pretrial discovery so as to allow the plaintiff to obtain whatever proof of a conspiracy that there may be in the hands of the defendants, and the discovery has not produced evidence supporting the conspiracy theory, and defendants' uncontradicted evidence negates the conspiracy theory, no question of material fact is presented and the defendants are entitled to summary judgment. *Modern*

Home Institute, Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 109 (2d Cir. 1975).

The rule has been clearly stated by the United States Court of Appeals for the Ninth Circuit:

> Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper.

ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975). To hold otherwise would give free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial with only a wing and a prayer supporting his well drafted complaint.

Mutual Fund Investors, Inc. v. Putnam Mgmt. Co., 553 F.2d 620, 624 (9th Cir. 1977).

The desirability of summary judgment disposition of antitrust litigation, when permissible, was noted by the United States Court of Appeals for the Seventh Circuit in *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979):

> Indeed, the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, (without intending any slur on plaintiff here), the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation, see *Poller, supra*, 368 U.S. at 474, 82 S.Ct. 486 (Harlan, J. dissenting). The

ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way. Judge (now Chief Judge) Skelly Wright, in a libel case, *Washington Post Co. v. Keogh*, 125 U.S.App.D.C. 32, 365 F.2d 965 (1966), noted that:

> * * * Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. * * * [Id. 125 U.S.App.D.C. at 35, 365 F.2d at 968.]

Id. at 1167. *See also Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981).

The relevant essence of this case's exhaustive discovery must now be examined in light of the foregoing case law guidance.

V. FACTS

A. Impro's Products

For over 20 years, Impro has been engaged in research, development, production and marketing of whey antibody blends and food supplements for use in livestock production. These products contain factors which are produced in the udders of cows. Many of Impro's products are marketed for the purpose of increasing milk production, and some are sold for the purpose of preventing or controlling infections in dairy cattle and other animals. Impro would produce evidence at trial that its products are effective and that, because they do not contain antibiotics, they are free from numerous problems associated with antibiotic livestock health care products and offer an effective alternative to antibiotic products.

From March 17, 1967, to September 17, 1967, the whey antibody blends were sold in interstate commerce by Impro pursuant to license issued by the United States Department of Agriculture (hereinafter USDA), and since September 17, 1967, they have been sold in intrastate commerce in four states. Impro's food supplements have been continuously sold in interstate commerce. Because Impro has not been licensed to sell its antibody blends in interstate commerce since 1967, it is what is referred to as an "intrastate laboratory."

B. Herrick and Impro, 1959-1962

As USDA Extension Veterinarian, Herrick's general function was to keep abreast of livestock health research and to gather information about livestock health problems throughout Iowa and bring such information to the attention of farmers and veterinarians.

From November of 1959 until the spring of 1962, Herrick had several communications with members of the Collins family concerning Impro's research and products development and clearly demonstrated an interest in the Impro products and their commercial possibilities. Mary Collins would testify at trial that in the spring of 1962 Herrick approached her requesting payment of $100 a month as a consultant to help promote Impro's products, but Impro declined and there was no more assistance after that from Herrick. (Herrick denies that he ever requested a fee arrangement with Impro.)

C. Herrick's Discrediting of Impro Products

To become commercially successful, a livestock health product needs to gain acceptance by federal and/or state regulatory agencies, if licensing by them is required before the product can be marketed, and by veterinarians. In respect to products marketed directly to lay consumers, their acceptance must also be gained.

During the mid and late 1960's and 1970's, two developments occurred that are central to Impro's conspiracy theory. One development was that Herrick was retained by each of the corporate defendants to perform certain services, and the other was that Herrick, by diverse means, actively sought to discredit the efficacy of Impro's products with state and federal regulatory officials and with veterinarians. In discrediting Impro's products, Herrick always appeared to be functioning as an objective USDA Extension Veterinarian and professor. It is Impro's theory that part of Herrick's duties under the agreements he had with the corporate defendants was to carry out a secret conspiracy of all the defendants to destroy Impro as a competitor.

The activities of Herrick in respect to Impro are not of primary concern in addressing the summary judgment motions because the threshold issue is not whether there is evidence of Herrick's activities (there is),[3] but whether there is evidence that his activities were part of a conspiracy or whether there is other evidence of the alleged conspiracy.

The evidence relating to each corporate defendant, including its relationship with Herrick, must be examined.

D. Herrick—Corporate Defendant Agreements Generally

Each agreement between Herrick and a corporate defendant will be separately examined in greater detail, *infra*.

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[3] Herrick's alleged activities in respect to Impro are chronicled in Impro's supplemental memorandum in opposition to the motions for summary judgment, pp. 66-84. A copy of these pages from the supplemental memorandum is attached hereto as Appendix A. The court attaches Appendix A merely as a convenient means of noting the discovery evidence of Herrick's activities relied on by Impro; the court is not accepting conclusory, argumentative and other non-evidentiary material contained in Appendix A.

Each agreement is considered to be a "consulting" agreement by Herrick and the corporate party, although Impro characterizes each agreement as something more than consulting in nature.

The uncontradicted discovery evidence is that none of the corporate defendants knew that Herrick had consulting agreements with any of the other corporate defendants until this lawsuit was commenced. The only revelation Herrick made about the consulting agreements was on disclosure reports he was required to file with Iowa State University, which became the source of Impro's knowledge of the agreements through a Freedom of Information Act request.

E. Diamond*

Diamond markets livestock health care products, including antibiotic products, with which Impro's products compete.

Herrick has been retained by Diamond since 1962 as a consultant. His compensation has increased during the two decades from $200 monthly to $400 monthly. (He also acquired 20 shares of Diamond stock in 1962.)

Diamond and Herrick consider Herrick's function to be to provide leads to Diamond for the hiring of high quality technical personnel, to advise Diamond of marketplace needs and trends, and to provide a veterinarian's perspective regarding Diamond's products and marketing activities.

At pages 32-38 of its supplemental memorandum, Impro details numerous contacts between Herrick and Diamond through the years. These contacts are consistent with Herrick's function under the agreement as defined by Herrick and Diamond. They do disclose that many of Herrick's contacts with Diamond related to marketing.

The discovery evidence does reveal that in 1976 Herrick sent to Robert Hansen, Diamond's vice-president in charge of

* See footnote 1.

marketing, a preliminary draft of a bill to control biologics within the state of Iowa.

The uncontradicted discovery evidence is that Herrick and Diamond personnel never mentioned or discussed Impro until after Impro filed this lawsuit. Shortly after the suit was filed, Herrick expressed to Diamond personnel that he was very concerned about his legal problem and that he was most concerned about how the individual companies felt about the matter. He also commented that his records would be subpoenaed and that his telephone conversations would be recorded.

The uncontradicted discovery evidence is that Diamond personnel never communicated with personnel of any other corporate defendant about Impro or its products until after this lawsuit was commenced.

In 1979, also after this lawsuit was filed, Herrick told Rex Jones, who was in charge of Diamond's technical assistance and research, to get information about Grand Labs, a Michigan intrastate laboratory, so Herrick could publish it.

Evidence that Diamond executive and management personnel even knew of the existence of Impro and its products prior to the commencement of this suit is scarce. Pre-lawsuit knowledge is denied by the deposed Diamond personnel. However, there is some circumstantial evidence from which a trier of fact might infer that somebody in the executive-management level of Diamond had knowledge of Impro and its products. Perhaps the strongest evidence is the fact that Impro was specifically mentioned at a 1975 meeting at which intrastate laboratories were generally discussed, which was attended by some Diamond personnel including its regulatory liaison, Busch Meredith.

Diamond holds numerous USDA licenses for its biologic products and is subject to periodic inspection of its facilities by USDA personnel. The deposition testimony of Mr. Meredith, Diamond's regulatory liaison, that his relationship with USDA officials is strictly limited to business is uncontradicted. Discovery produced no evidence that Diamond personnel knew of communications by Herrick with USDA officials regarding Impro during the time Impro's license application was pending with USDA.

Discovery evidence does disclose that Diamond personnel hold unfavorable attitudes toward livestock health product laboratories that are not licensed by USDA.

Discovery evidence discloses Diamond's participation in certain trade associations and its sponsorship of university research. The participation of Diamond and other defendants in trade associations and sponsorship of university research will be examined *infra*.

F. Babson

Babson's primary products are milking equipment and related products. Babson does not market antibiotics, vaccines or serums. The only competition between Babson and Impro arises from the fact that both market teat dips. There is conflicting opinion as to whether teat dip is a health product or a cosmetic.

Herrick has been retained by Babson as a consultant since June of 1976. He is paid $500 a month and reimbursed travel expenses. The agreement calls for Herrick to regularly contribute articles to *Dairy Illustrated*, a Babson publication, be available for speaking engagements, and be available for any Babson meeting and travel to Latin America.

Herrick spoke at various Babson meetings, in and out of the United States.

Herrick was listed as Animal Health Editor of *Dairy Illustrated*, in which he was identified as being affiliated with Iowa State University. His consulting connection with Babson was not revealed in the magazine, although a paid connection with Babson would be a reasonable inference from his editorial position with the Babson publication. His articles contained comments favorable to products of Babson, Diamond, Philips Roxane and RM&D's client, American Cyanamid. In an article in the fall of 1977, he warned against products "undocumented and unrecognized in the scientific community," and reported an incident of non-licensed vaccine supposedly causing the death of a large number of calves.

The uncontradicted discovery evidence is that Impro and its products were never discussed between Herrick and Babson personnel, or between Babson personnel and personnel of any other corporate defendant, until after Impro initiated this lawsuit.

The uncontradicted discovery evidence is that teat dips and the teat dip market were never discussed between Herrick and Babson personnel.

Discovery evidence discloses Babson's participation in the National Mastitis Council and its sponsorship of university research. This evidence will be examined, *infra*.

G. Searle*

Searle manufactures and markets pharmaceutical preparations for human use, and it has subsidiaries that have developed and marketed other health care products. Beginning in 1969, a subsidiary of Searle marketed livestock health products, including antibiotics, through the Curtis Breeding Service division. Some of these products competed with those of Impro.

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* See footnote 1.

Herrick served as a consultant to Curtis Breeding Service from 1972 through 1977. Payments to him ranged from $5,000 in 1973 to $1200 in 1977.

Herrick's services to Curtis consisted of providing Curtis with advice and information relative to breeding and raising cattle, marketing of products, state of the beef industry and market, and legislative matters, as well as providing articles for publication by Curtis.

The uncontradicted discovery evidence is that Herrick never discussed Impro or its products with Curtis or Searle personnel prior to the commencement of this lawsuit.

The uncontradicted discovery evidence is that Searle or Curtis personnel never communicated with any defendant about Impro or its products prior to the commencement of this lawsuit.

Consideration was given in 1975 or 1976 to having Curtis market an Impro product, but the idea was rejected because the product could not be marketed nationally. Herrick was in no way involved in this matter.

H. RM&D

RM&D is an advertising and public relations firm that has as a client American Cyanamid, which manufactures and markets livestock health products, including antibiotic products, some of which compete with those of Impro. RM&D prepares for American Cyanamid printed advertisements for farm media and veterinary journals. RM&D, of course, does not itself manufacture or market livestock health products.

Up until 1975, Herrick had consulted to American Cyanamid for $1200 a year. In 1975, Herrick was retained by RM&D as a consultant for $10,000 a year, for which RM&D has been reimbursed by American Cyanamid. The direct relationship

between Herrick and American Cyanamid terminated when Herrick entered into the agreement with RM&D.

Herrick provides RM&D general information concerning the animal health economy, management trends, new products, new ideas and problem areas.

The uncontradicted discovery evidence shows that RM&D has never performed any services or in any fashion represented any of the other corporate defendants and has never had any communication with any other defendant, including Herrick, concerning Impro or its products until after this litigation was commenced.

The uncontradicted discovery evidence shows that RM&D never communicated with any trade organization or anybody in the USDA concerning Impro or its products.

The uncontradicted discovery evidence shows that nobody at RM&D even knew Impro existed until this lawsuit was commenced.

American Cyanamid has been active in the American Health Institute, a national trade association. The role of this trade association will be considered, *infra*.

I. Upjohn

Upjohn markets livestock health care products, including antibiotic products, with which Impro's products compete.

Herrick has been retained by Upjohn as a consultant since 1966 under a series of written agreements. (Upjohn's agreements with all of the other corporate defendants have been oral.) His original compensation was $1500 a year.

Under the terms of the agreements between Herrick and Upjohn, the existence of the agreements was to be kept confidential and Herrick was not to consult for other firms in the field without prior written approval of Upjohn. (Herrick breached this provision—Upjohn did not learn of Herrick's

consulting relationships with the other corporate defendants until this lawsuit was commenced.)

Under the agreements with Upjohn, Herrick's duties related to Upjohn's livestock health products. He kept Upjohn's marketing people informed of trends, and he would inform Upjohn about competitive products.

The uncontradicted discovery evidence is, however, that Herrick never discussed Impro's products or whey antibodies generally or Impro with Upjohn personnel.

There is no evidence that anybody at Upjohn communicated in any way with any of the defendants concerning Impro or its products. In fact, the undisputed discovery evidence is that John Studebaker, the person at Upjohn who was responsible for the original and continued retention of Herrick, did not even know Impro existed until after this lawsuit was commenced. (There were some people at Upjohn, specifically Gene Swenson and Charles Fahro, who did have knowledge of the existence of Impro and its products.)

Discovery evidence discloses that Upjohn participated in certain trade associations and sponsored some university research, subjects that will be examined *infra*.

J. Philips Roxane

Philips Roxane produces livestock health care products, including antibiotics, biologics and teat dips, with which Impro's products compete.

Herrick began consulting to Philips Roxane in the mid or late 1960's. Discovery evidence from Philips Roxane suggests that it began in 1965, but Herrick recollects that it began approximately in 1969. As compensation for his services, Philips Roxane provides Herrick with the use of an automobile and reimbursement of the automobile expenses. There are no restrictions on the use of the automobile, business or personal.

Herrick's consulting for Philips Roxane consists of informing the company about new products, problems in the animal health field, or problems with Philips Roxane's products; appearing at press conferences and attending other meetings concerning Philips Roxane's products; assisting in finding personnel to fill job openings at the company; and generally being available to answer questions from Philips Roxane's technical, marketing and sales staff.

The uncontradicted discovery evidence is that Herrick and Philips Roxane personnel never mentioned or discussed Impro or its products until after Impro filed this lawsuit.

The uncontradicted discovery evidence is that Philips Roxane personnel never had communications with any of the other corporate defendants concerning Impro or its products until after Impro filed this lawsuit.

Discovery evidence does disclose that Philips Roxane personnel did have concerns about intrastate laboratories, and at one time they expressed concern to Herrick about his apparent connection with Bob Plymate and his intrastate laboratory product, Natur's Whey—Philips Roxane was concerned about Herrick's continued credibility if his name were associated with an intrastate laboratory.

In 1977 Philips Roxane sent to the Senior Staff Veterinarian, Biologic Licensing and Standards, USDA, copies of advertising copy of Impro Products and Grand Laboratories and inquired as to whether interstate advertising is lawful when describing products presumed to be manufactured for intrastate use. No response was received; however, shortly thereafter certain of Impro's advertising literature was seized, withdrawn from circulation and burned by order of USDA.

During most of 1978 Dr. R. E. Miller was Acting Branch Chief of the Ruminant Division, Therapeutics Products Branch,

FDA. In October he was selected by the Director of the Bureau of Veterinary Medicine as a member of a review team to review the Beltsville test, Impro's version of which is described in Appendix A attached hereto. At that time, Miller had already been hired by Philips Roxane for a position with clinical research and regulatory affairs, which the Director knew. The review team approved the Beltsville test, after which Miller left FDA and went to Philips Roxane, taking the Beltsville review documents with him.

Discovery evidence discloses Philips Roxane's participation in certain trade associations and its sponsorship of university research. This evidence will be examined *infra*.

K. Trade Organizations

The fact that some of the corporate defendants, as well as American Cyanamid, participate in trade organizations has been previously noted. Herrick also participates in trade organizations.

It is Impro's theory that the defendants have used these trade organizations as forums to meet and conspire and as instrumentalities of the alleged conspiracy.

The evidence on which Impro relies in respect to trade organizations is detailed in its supplemental memorandum. As a convenient means of setting forth this evidence, the pertinent portions of the supplemental memorandum are attached hereto as appendixes. The court has excised from the reproduced pages of the supplemental memorandum most of the argumentative, conclusive and other non-evidentiary language; what little remains was not excised because it is interwoven with evidence or was inadvertently overlooked.

Appendix B sets forth pp. 85-89 of the supplemental memorandum relating to The Livestock Conservation Institute (LCI).

Appendix C sets forth pp. 90-100 of the supplemental memorandum relating to The Academy of Veterinary Consultants (AVC).

Appendix D sets forth pp. 102-105 of the supplemental memorandum relating to the American Dairy Science Association (ADSA).

Appendix E sets forth pp. 106-126 of the supplemental memorandum relating to the Animal Health Institute (AHI).

Appendix F sets forth pp. 127-141 of the supplemental memorandum relating to the National Mastitis Council (NMC).

L. University Professors

The fact that some of the corporate defendants, as well as American Cyanamid, sponsored university research has been previously noted. It is Impro's theory that the defendants have used the professors who did the research as instrumentalities of the alleged conspiracy.

The evidence on which Impro relies in respect to university professors is detailed in pages 142-164 and 172-181 of Impro's supplemental memorandum. As a convenient means of setting forth this evidence, these pages are attached hereto as Appendix G and Appendix H, respectively. The court has excised from the reproduced pages most of the argumentative, conclusive and other non-evidentiary language; what little remains was not excised because it is interwoven with evidence, or was inadvertently overlooked. (Appendix H sets forth evidence Impro relies on relative to Babson's use of university research in respect to what Impro calls the "Velvet Dip controversy.")

VI. DISCUSSION

A. Sherman Act Conspiracy Generally

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, provide in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

15 U.S.C. § 1.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

15 U.S.C. § 2.

As observed in *Modern Home Institute, Inc. v. Hartford Accident & Indemn. Co., supra*, 513 F.2d at 108-09:

> Section 1 of the Sherman Act, which proscribes every "contract, combination, or conspiracy" in restraint of trade, is directed only at joint action. Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 878 (1st Cir. 1966). It does not prohibit independent business actions and decisions. * * * Fundamental then to any § 1 claim is the finding of an agreement, express or otherwise, between two or more persons.

Impro's theory is that the defendants have conspired to restrain trade in violation of section 1 and to monopolize trade in violation of section 2 by unfairly disparaging Impro's new and innovative products. The section 2 claim is not a "market share" claim; rather it is a "market structure" claim, and the conspiracy theory underlies it as well as the section 1 claim. (Transcript of hearing on motions for summary judgment, p. 72.)

A conspiracy of producers or providers of conventional products or services to unfairly block out of the market a producer or provider of a competitive new innovative product

or service is actionable under the Sherman Act. *Hydrolevel Corp. v. American Soc. of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980); *aff'd*, 102 S.Ct. 1935 (1982); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980); *McDonald v. Johnson & Johnson*, Civ. No. 4-79-189 (D. Minn. April 14, 1982) (unpublished memorandum opinion and order).

As previously noted, the threshold issue raised by the motions for summary judgment is whether Impro has evidence of a conspiracy. If the discovery evidence, viewed in the light most favorable to Impro and giving Impro the benefit of all reasonable inferences is insufficient to permit the jury to find that the conspiracy alleged in fact existed, the motions must be sustained. *See* cases cited and quoted in Part IV .B hereof.

In a case like this, where exhaustive discovery has failed to uncover any direct evidence of the alleged conspiracy, and where all of the alleged conspirators and their deposed and affiant officers and employees give uncontradicted sworn testimony not only denying the existence of any conspiratorial agreement or understanding but denying that the target of the alleged conspiracy was even mentioned in any communications among them, the burden shifts to the plaintiff to come forward with specific and probative evidentiary facts showing that there is a genuine fact issue of conspiracy to be tried. Fed. R. Civ. P. 56(e); *First Nat'l Bank v. Cities Service Co., supra*, 391 U.S. at 288-90; *Weit v. Continental Ill. Nat'l Bank & Trust Co., supra*, 641 F.2d at 461; *Modern Home Institute, Inc. v. Hartford Accident & Indemn. Co., supra*, 513 F.2d at 109.

B. Impro Relies on Circumstantial Evidence

Impro concedes that it has discovered no direct evidence of the alleged conspiracy—no "smoking gun." Indeed, there is

no direct evidence that prior to the commencement of this lawsuit any of the defendants ever communicated with any other defendant, including Herrick, about Impro or intrastate laboratories generally. Impro relies on circumstantial evidence of motive, opportunity, parallel conduct and inferences to be drawn therefrom. The competition of Impro's innovative new products is identified by Impro as the motive; ties of each corporate defendant to Herrick and participation of several defendants in trade organizations is identified by Impro as the opportunity; activity against Impro or intrastate laboratories generally on the part of some defendants and trade organizations in which some defendants participated and university professors who did research funded by some defendants is identified by Impro as the parallel conduct; and unlawful conspiracy is the ultimate inference Impro asserts a jury may reasonably draw from the evidence of motive, opportunity and parallel conduct.

C. Motive and Opportunity

A plaintiff in an antitrust case would be hard pressed to prove a conspiracy to restrain or monopolize trade if the defendants had no motive to do so. *See First Nat'l Bank v. Cities Service Co., supra.* Similarly, it is self-evident that a plaintiff could not prove a conspiracy if the defendants had no opportunity to conspire. Opportunity is a condition precedent to sinning of any sort. However, existence of both motive and opportunity to conspire[4] is hardly sufficient to support an inference that there in fact was a conspiracy. Were motive and opportunity sufficient, almost all business entities could be brought to trial on antitrust claims by a wounded competi-

[4] The discovery evidence will support a finding of opportunity to conspire on the part of all remaining defendants and a motive to conspire on the part of all remaining defendants except RM&D.

tor, and the reports would be void of cases granting and upholding summary judgment in antitrust cases.

Although motive was a factor in the 5-4 reversal of a grant of summary judgment in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), that case does not stand for the proposition that summary judgment is never to be granted if there is evidence of a motive to conspire. The question in *Poller* was the defendants' actual motive in doing what they undisputedly jointly did, not whether they theoretically had a competitive motive to conspire to restrain and monopolize trade. *See First Nat'l Bank v. Cities Service Co., supra*, 391 U.S. at 284-85; *Weit v. Continental Ill. Nat'l Bank & Trust Co., supra*, 641 F.2d at 466; *Modern Home Institute, Inc. v. Hartford Accident & Indemn. Co., supra*, 513 F.2d at 109-110. *Poller* is also distinguishable because, unlike this case and cases cited herein upholding summary judgment, it was decided on an incomplete or inconclusive discovery record comprised of just a few affidavits and depositions. *Poller v. Columbia Broadcasting System, supra*, 368 U.S. at 468. *See Modern Home Institute, Inc. v. Hartford Accident & Indemn. Co., supra*, 513 F.2d at 109-110.

The opportunity to conspire was heavily relied on by plaintiffs as probative evidence of unlawful conspiracy in *Weit v. Continental Ill. Nat'l Bank & Trust Co., supra*. In response, the court observed:

> Yet, the mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence. *See Venzie Corporation v. United States Mineral Products Co.*, 521 F.2d 1309 (3rd Cir. 1975); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 535 (E.D. Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir. 1975).

Weit v. Continental Ill. Nat'l Bank & Trust Co., supra, 641 F.2d at 462 (footnote omitted).

D. Parallel Conduct

Impro, however, relies on more than motive and opportunity; it relies on parallel conduct of the defendants. The conduct relied on by Impro, some specifically in respect to Impro and some in respect to intrastate laboratories generally, has been set out in Part V hereof and the appendixes. Most of this conduct relates to the participation of some defendants in trade organizations that took positions and took actions contrary to the interests of Impro and intrastate laboratories generally, and the connections between some defendants and university professors who were publicly critical of Impro products and intrastate laboratories generally.[5]

In *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978), the United States Court of Appeals for the Eighth Circuit discussed drawing an inference of a conspiracy agreement from parallel conduct:

> The plaintiffs were not required to directly prove the fact of an agreement among the distributor-defendants

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[5] Defendants vigorously contend that Impro is limited to proving the conspiracy it pleaded in its amended complaint—one among the original seven defendants pursuant to which Herrick, for compensation from each corporate defendant, would destroy Impro as a competitor—and that Impro cannot now be allowed to prove the "broader conspiracy" it asserts the discovery evidence has disclosed. Defendants contend that therefore the trade organization and university professor evidence cannot be considered. The court agrees that Impro may recover in this case only by proving the conspiracy it pleaded. However, in attempting to prove the conspiracy pleaded Impro may introduce any relevant evidence including evidence that the pleaded conspiracy also involved nondefendants as additional coconspirators or as "instrumentalities" of the pleaded conspiracy. Therefore, the discovery evidence relating to trade associations and university professors is considered by the court in ruling on the motions for summary judgment.

or between the distributor-defendants and the exhibitor-defendants. Evidence from which an agreement could be inferred is sufficient. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86, 93 (10th Cir.), *cert. denied*, 347 U.S. 976, 74 S.Ct. 787, 98 L.Ed. 1115 (1954). However, to avoid a directed verdict "the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion." *Johnson v. J.H. Yost Lumber Co.*, 117 F.2d 53, 61 (8th Cir. 1941); *see Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., supra*, 409 F.2d at 1202-03 n.8; *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975). Furthermore, an inference which a jury is entitled to draw must be based upon proven facts and not upon other inferences. *Wesson v. United States*, 172 F.2d 931, 936 (8th Cir. 1949); *Brown v. Maryland Cas. Co.*, 55 F.2d 159, 161 (8th Cir. 1932).

The plaintiffs correctly note that similar practices by competitors, *i.e.*, "conscious parallelism," will sometimes support an inference of an agreement. However, as the Supreme Court stated in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954), " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions by the distributor as with the planned exclusion of the plaintiffs. *Id.* at 540-42, 74 S.Ct. 257;

Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19-20 (9th Cir. 1971); *Brown v. Western Mass. Theatres, Inc.*, 288 F.2d 302, 305-06 (1st Cir. 1961). Section 1 of the Sherman Act does not prohibit independent business actions and decisions. Only where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from such parallel action. *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 279-80, 287, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *Michelman v. Clark-Schwebel Fiber Glass Corp., supra*, 534 F.2d at 1047; *Venzie Corp. v. United States Mineral Prods. Co., supra*, 521 F.2d at 1314-15; *Viking Theatre Corp. v. Paramount Film Distrib. Corp., supra*, 320 F.2d at 299; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 657-59, 681 (1962).

See also Weit v. Continental Ill. Nat'l Bank & Trust Co., supra, 641 F.2d at 462-63.

The United States Court of Appeals for the District of Columbia Circuit has observed:

> Although parallel behavior may support an inference of conspiracy when the alleged co-conspirators have acted in a way inconsistent with independent pursuit of economic self-interest, that inference is warranted only when a theory of rational, independent action is less attractive than that of concerted action. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939) *with First National Bank v. Cities Ser-*

vice Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 267 (D.C. Cir. 1981) (footnote omitted).

Furthermore, mutual awareness among defendants of their similar conduct is significant only if it is "an element entering into each party's decisional process, and the basis for inferring that it did so must be something more substantial than a guess." *Brown v. Western Mass. Theatres, Inc.*, 288 F.2d 302, 305-06 (1st Cir. 1961) (on petition for rehearing).

Initially, it should be noted that the uncontradicted evidence shows that the various trade organizations in question serve the customary legitimate purposes of trade organizations, and that participation in the trade organizations by Herrick and corporate defendants is wholly consistent with their professional and business interests. It should further be noted that funding by corporations of university research in areas of their field of commerce is commonplace and wholly consistent with their business interests.

There is nothing in the discovery record disclosing that any defendant did anything in respect to or affecting Impro or intrastate laboratories generally that was not consistent with his or its legitimate self-interest and business or professional judgment. No conspiracy theory is needed to make sense out of each defendant's actions. Each action alone served the legitimate self-interest of the actor, and did not require parallel action of others to assure that the action served self-interest.

The standards for inferring a conspiracy from parallel conduct as set forth in *Admiral Theatre Corp. v. Douglas Theatre Co., supra*, 585 F.2d at 884, are not satisfied by the discovery record. At best, the parallel conduct in this case

gives rise to only a suspicion of conspiracy or an inference of conspiracy drawn from other inferences. That is not enough.

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), offers no support to plaintiff because it is clearly distinguishable on its facts. The record showed that the conspiracy was launched by a proposal in a letter from a representative of the two film exhibitor defendants *jointly addressed* to the branch managers of the eight film distributor defendants. Conferences followed and ultimately each of the eight distributors agreed to the proposal which constituted an important departure from their prior practice. The distributors knew that they were in active competition with one another and that without unanimous action there was risk of a substantial loss of business, but with unanimity there was the prospect of increased profits. Finally, none of the distributors called as witnesses any of its superior officials, or other persons who, in the normal course of business, would have knowledge of the existence or non-existence of an agreement among the distributors. The Court held that the evidentiary record permitted an inference of conspiracy. The type of factors present in the *Interstate* record justifying an inference of conspiracy are absent from the exhaustive discovery record in this case.

E. Conclusions

The discovery record as a whole in this case may well raise some questions about the propriety of Herrick, a tax-paid animal health official whose professional objectivity the public should be entitled to rely upon, serving as a paid consultant to, and promoter of the products of, private businesses in the animal health field. The record may also raise questions about the objectivity of university research funded by corporations with self-interest in the results of the research.

However, the discovery record as a whole does not support a reasonable inference that the alleged conspiracy among the defendants in fact existed. The alleged conspiracy agreement has been denied under oath by Herrick and all the officers and employees of the corporate defendants who have been deposed or given affidavits. All deny under oath that Impro and its products were even mentioned between or among any of them. No direct evidence to the contrary has been found. The sworn testimony of all concerned establishes without contradiction that none of the corporate defendants even knew that Herrick had consulting agreements with any of the other corporate defendants. And although a theoretic competitive motive to conspire existed for all defendants except RM&D, and opportunity to conspire existed for all defendants, the well established requisites for an inference of conspiracy from parallel conduct are not fulfilled by the record.

Defendants have shown by the uncontradicted sworn testimony of Herrick and the corporate defendants' officers and employees that the consulting agreements are not susceptible of plaintiff's conspiracy interpretation, and plaintiff has failed to meet its obligation of producing evidence supporting the conspiracy inference urged by it. As a result, plaintiff must suffer summary judgment dismissing its complaint. Fed. R. Civ. P. 56(e); *First Nat'l Bank v. Cities Service Co., supra,* 391 U.S. at 288-90; *Weit v. Continental Ill. Nat'l Bank & Trust Co., supra,* 641 F.2d at 462; *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 889; *Modern Home Institute, Inc. v. Hartford Accident & Indemn. Co., supra,* 513 F.2d at 109.

The foregoing conclusions being dispositive of the Sherman Act claims in Count I of plaintiff's amended complaint, the

additional grounds urged by the defendants for summary judgment or partial summary judgment are not addressed.[6]

Count I of the plaintiff's amended complaint must be dismissed for the foregoing reasons.

Counts II and IV are pendent state law claims involving no federal question. Requisite diversity is not present for federal jurisdiction under 28 U.S.C. § 1332. The federal claim being dismissed, it is appropriate to also dismiss Counts II and IV.

RULINGS AND ORDER

The motion of each remaining defendant for summary judgment is sustained, and IT IS ORDERED that all counts of plaintiff's complaint be dismissed.

DATED this 13th day of August, 1982.

HAROLD D. VIETOR
United States District Judge

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[6] Were the additional *Noerr-Pennington* doctrine issue addressed, it is doubtful that the discovery evidence would be found sufficient to permit trial of plaintiff's "sham exception" theory. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127; *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC.,

Plaintiff,

vs.

JOHN B. HERRICK, et al.,

Defendants.

JUDGMENT

This action came on for consideration before the Court, Honorable Harold D. Vietor, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the motion of each remaining defendant for summary judgment is hereby sustained;

IT IS FURTHER ORDERED AND ADJUDGED that all counts of plaintiff's complaint are hereby dismissed.

DATED at Des Moines, Iowa this 13th day of August, 1982.

JAMES R. ROSENBAUM
Clerk

By:
LAURIE S. AUGLESSOWER
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC.,

Plaintiff,

v.

JOHN B. HERRICK, et al.,

Defendants.

RULING

Plaintiff's motion for rehearing of order granting summary judgment is denied.[1]

DATED this 19th day of October, 1982.

HAROLD D. VIETOR
United States District Judge

[1] This footnote addresses a collateral matter raised by the following paragraph at page 10 of plaintiff's motion for rehearing:

> The Court's finding that none of the corporate defendants knew that the other corporate defendants were utilizing Herrick's services is not accurate in one respect. Norman Jungk knew about the Diamond/Herrick connection while at Diamond in 1964, and learned of the Philips Roxane/Herrick relationship while employed by Philips Roxane in 1972 (Jungk Dep. at 33, 35).

Local Rule 2.2.7 provides in pertinent part:

> SUMMARY JUDGMENTS—STATEMENT OF FACTS REQUIRED: Upon filing any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the motion and brief a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, including

(Footnote 1 continued)

specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions and a memorandum of authorities.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions and a memorandum of authorities.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Paragraph 8 of statement of material facts in support of Philips Roxane's motion for summary judgment, filed March 11, 1982, states:

8. Philips Roxane first learned that Dr. Herrick was doing consulting work for other defendants in this case when the various parties were named as defendants in this suit. *See* Third Interrogatories, Answer to Interrogatory No. 41; John Thompson Deposition at page 268, line 13, to page 269, line 2.

Plaintiff, in its material facts in dispute in response to Philips Roxane's undisputed facts filed April 26, 1982, responded to Philips Roxane's paragraph 8 by stating and arguing that it is unreasonable to believe that Philips Roxane did not know that Herrick had relations with other firms. Plaintiff did not refer the court to the Jungk deposition. Indeed, nowhere in the hundreds of pages of factual recitations of plaintiff in support of its resistance to the motions for summary judgment did plaintiff direct this court's attention to any deposition testimony or other discovery evidence disclosing that any corporate defendant had any knowledge that Herrick had a consulting relationship with any other corporate defendant.

In ruling on a motion for summary judgment the court is entitled to rely upon the facts as set forth in the statements of facts supplied by the parties under Local Rule 2.2.7, and is not required to independently peruse all of the depositions and other discovery evidence to search for any item of evidence that may have eluded the parties.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC.

Plaintiff,

v.

JOHN B. HERRICK, et al.,

Defendants.

SUPPLEMENT TO FOOTNOTE IN RULING

Footnote 1 to the ruling denying motion for rehearing, filed herein on October 19, 1982, is supplemented by adding to the penultimate paragraph thereof the following:

> Furthermore, during oral arguments on the defendants' motions for summary judgment, Mr. Witke, speaking on behalf of all defendants (Transcript at 8, lines 4-5), asserted that the discovery evidence showed that no corporate defendant knew Herrick was consulting for any other corporate defendant (Transcript at 13, lines 12-18), and this factual assertion was not denied by plaintiff's counsel.

DATED this 20th day of October, 1982.

HAROLD D. VIETOR
United States District Judge

No. 83-993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

IMPRO PRODUCTS, INC.,
Petitioner,
v.
JOHN B. HERRICK, BABSON BROS. CO.,
UPJOHN CO. and PHILIPS ROXANE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE ISSUES RAISED BY PETITIONER HAVE NO FACTUAL BASIS OR WERE RESOLVED IN PETITIONER'S FAVOR BELOW.

2. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE APPROPRIATE SUMMARY JUDGMENT STANDARD WAS APPLIED AND NO CONSTITUTIONAL CLAIM HAS BEEN PRESERVED.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals except for defendant Richardson, Myers & Donofrio. Counsel for respondents are informed that, although settlement negotiations are in process between petitioner and Richardson, Myers & Donofrio, no final settlement agreement has been signed as of the date of the filing of this brief in opposition. Two other defendants, Diamond Laboratories, a division of Syntex Corp., and G. D. Searle & Co. settled with Petitioner shortly before the entry of summary judgment in this case.

Babson Bros. Co. has no parent, subsidiary or affiliated companies.

The Upjohn Company has no parent, and has only wholly owned companies.

Philips Roxane, Inc., was a wholly owned subsidiary of North American Philips Corporation at the time of the filing of this case. During its pendancy, this respondent was sold to Boehringer-Inglehein, Ltd., a West German concern.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-993

IMPRO PRODUCTS, INC.,
Petitioner,

v.

JOHN B. HERRICK, BABSON BROS. CO.,
UPJOHN CO. and PHILIPS ROXANE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, John B. Herrick, Babson Bros. Co., Upjohn Co. and Philips Roxane, Inc. respectfully oppose the Petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on August 11, 1983.

OPINIONS BELOW

See Petition for Writ of Certiorari herein, p. 2
(Rule 34.2, Rules of the Supreme Court)

JURISDICTION

See Petition for Writ of Certiorari herein, p. 2
(Rule 34.2, Rules of the Supreme Court)

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari herein, p. 3
(Rule 34.2, Rules of the Supreme Court)

STATEMENT OF THE CASE

Pursuant to Rules 22 and 34.2 of the Rules of the Supreme Court this statement of the case is submitted to correct material omissions and inaccuracies in the statement of the case set forth in the Petition for Writ of Certiorari. On August 3, 1978, Petitioner filed its complaint alleging, *inter alia*, a conspiracy among the defendants to restrain trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Petitioner also alleged certain common law torts in pendent counts.

After motions to dismiss were disposed of and answers filed, Petitioner embarked upon a massive discovery effort. More than one hundred persons were deposed generating in excess of twenty thousand pages of transcript, thirty-two sets of interrogatories were answered, thirteen sets of requests for admissions served and twenty-eight sets of document production requests were filed. In addition, Petitioner filed other suits arguably related to the one at bar and sought to use materials obtained in such cases and from various Freedom Of Information Act requests in this cause. *Impro Products, Inc. v. Herrick*, 715 F.2d 1267 at 1276 n.11 (8th Cir. 1983), A-18.[1]

Contrary to Petitioner's assertions, it pursued discovery and argued against summary judgment on the basis that it had alleged and expected to prove a conventional horizontal conspiracy among the defendants. The plead-

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[1] In order to avoid confusion and needless duplication, references to the Petition for Writ of Certiorari are cited as Pet. ——, references to the appendix of the petition are cited as A-——, references to the appendix to this Brief in Opposition are cited as R.A.-——.

ings, discovery and filings below are replete with references to "a common scheme or plan pursuant to which [the defendants] would jointly carry out activities". 715 F.2d 1267 at 1280, n.16, A-26. The confusion arises from the fact that subsequent to the grant of summary judgment, Petitioner moved for a rehearing on the order and for the first time hinted at its "rimless wheel" or "multiple vertical conspiracy" theory. R.A.-5a-6a. The District Court denied the motion without making any further specific findings. A-60.

In addition to findings of the District Court set out in Petitioner's argumentative statement of the case, the District Court made the following findings regarding these respondents:

Babson

> "The uncontradicted discovery evidence is that Impro and its products were never discussed between Herrick and Babson personnel, or between Babson personnel and personnel of any other corporate defendant, until after Impro initiated this lawsuit.
>
> The uncontradicted discovery evidence is that teat dips and the teat dip market were never discussed between Herrick and Babson personnel." A-41.[2]

Upjohn

> "The uncontradicted discovery evidence is, however, that Herrick never discussed Impro's products or whey antibodies generally or Impro with Upjohn personnel.
>
> There is no evidence that anybody at Upjohn communicated with any of the defendants concerning Impro or its products. In fact, the undisputed discovery evidence is that John Studebaker, the person at Upjohn who was responsible for the original and

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[2] The teat dip market is the market in which Babson and Petitioner allegedly competed.

continued retention of Herrick, did not even know Impro existed until after this lawsuit was commenced. (There were some people at Upjohn, specifically Gene Swenson and Charles Fahro, who did have knowledge of the existence of Impro and its products)." A-44

Philips Roxane

"The uncontradicted discovery evidence is that Herrick and Philips Roxane personnel never mentioned or discussed Impro or its products until after Impro filed this lawsuit.

The uncontradicted discovery evidence is that Philips Roxane personnel never had communications with any of the other corporate defendants concerning Impro or its products until after Impro filed this lawsuit." A-45.

Similar findings were made with respect to each of the defendants who settled both prior to and subsequent to the entry of summary judgment in this case.[8] These findings were specifically adopted by the Court of Appeals. 715 F.2d 1267 at 1277, 1280, A-19, A-25. Petitioner makes no attempt to challenge these findings.

Finding that the consulting arrangements were nothing more than legitimate relationships beneficial to each "corporate defendant", the District Court concluded after an exhaustive analysis and proper application of the legal standards that summary judgment was appropriate. A-57.

On appeal, Petitioner abandoned its horizontal conspiracy claim and sought reversal by reason of the District Court's alleged failure to consider either a rimless wheel conspiracy or a series of vertical conspiracies. 715 F.2d 1267 at 1272-73, A-9. The Court of Appeals in dealing with the two newly espoused theories concluded that no evidence sufficient to warrant a reversal had been offered to the District Court. A-22, A-25.

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[8] See Parties to the Proceedings.

SUMMARY ARGUMENT

Of the five issues presented by Petitioner for review in this case, three were resolved in favor of Petitioner by the lower courts but were not factually supportable in the record (Petitioner's Issues I, II and IV), one was not raised or preserved for appeal in the lower courts, and the last (Issue V) was clearly properly resolved by the lower courts and is merely a request that this Court review the massive discovery record again in search of evidence of a conspiracy neither lower court could find.

The Court of Appeals concluded that the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a hub-and-spoke conspiracy as have the two other federal courts who have addressed this issue. Petitioner has been unable to generate any evidence of such a conspiracy. The Petition, therefore, asks for an advisory opinion which is not dispositive of or even properly raised by the case before the Court. Similarly, Petitioner's plea for the Court's review of the standards to be applied in assessing inferences to be drawn from facts does not fairly arise in this case because there was simply no evidence of communication between Respondents concerning Petitioner, let alone communication from which conspiracy reasonably could be inferred. These issues have already been resolved in favor of Petitioner to no avail and are not, therefore, appropriate matters for review.

Petitioner's claim of violation of its right to due process (Issue III) has not been previously raised or preserved and is in any event, without merit in the instant case.

The lower courts applied the appropriate standards in granting and affirming summary judgment, and no further review of the record by this Court is necessary.

ARGUMENT

REASONS FOR DENYING WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE ISSUES RAISED BY PETITIONER HAVE NO FACTUAL BASIS OR WERE RESOLVED IN PETITIONER'S FAVOR BELOW

Petitioner attempts to present five issues for review. None is sufficiently significant to warrant a grant of the Writ. Further, the stated issues do not legitimately arise out of the facts shown in the record.

Petitioner's most significant problem with regard to its petition is that both the District Court and the Court of Appeals found in its favor on every "significant" legal issue in the case. Unfortunately for the Petitioner, both Courts held against it on every important factual issue. This section of the argument will deal with Issues I, II and IV of the Petition.

Petitioner urges the Court to decide that the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a so-called "hub-and-spoke" or "rimless wheel" conspiracy. Although this Court may not have directly addressed the issue, every federal court which has addressed the issue, including the Court of Appeals in this cause, has recognized the legitimacy of such an antitrust theory if a proper factual predicate is laid. Indeed, since this Court first hinted that such a theory might be available in 1946 [*See Kotteakos v. United States*, 328 U.S. 750 (1946)], anti-trust plaintiffs have attempted to use it in only three reported cases including the case at bar in the ensuing thirty-seven years. *Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1279 at n.14 (8th Cir. 1983); *Harlem River Consumer Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251, 1279 (S.D.N.Y. 1976), *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-47 (6th Cir. 1972). Consequently, there appears to be no conflict among the

Courts of Appeals. In any event, an issue upon which Petitioner prevailed below should not serve as a rationale for a grant of the Writ.

Petitioner also apparently claims in the first section of its argument that this Court should use the case at bar as a vehicle to offer guidance to the Courts of Appeals "as to what is needed to show some types of conspiracies." Pet. 14. There is no logical nexus between this claim and the balance of Petitioner's first issue. Suffice it to say that there is no conflict in the analytical framework or standard of proof among the three cases cited: *Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), cert. granted, 456 U.S. 971 (1982), cert. dismissed, 31 S.Ct. 3100 (1983); *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3rd Cir. 1981), cert. denied, 452 U.S. 893 (1981); and the *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982).

With regard to Petitioner's second alleged reason for granting the Writ of Certiorari, the same rationale for denying the writ applies, for it is again a blatant invitation for an advisory opinion. The case law concerning the inferences to be drawn from conduct in horizontal and vertical conspiratorial cases is not alleged to be in conflict among the Circuits, nor is it alleged to be unclear or even wrong. Petitioner only requests that the Court review the findings of the District Court as to whether Petitioner had met the test for the inference of a "hub-and-spoke" conspiracy set forth in *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972).

In this regard, Petitioner makes all sorts of heavy weather over a claimed oversight by the District Court when it found that the "corporate defendants" did not know that Herrick had consulting relationships with other "corporate defendants". Petitioner claims that this alone is sufficient to prevent the entry of summary judg-

ment. But Petitioner's claim in this regard is founded on a misstatement of the record. Norman Jungk is a mid-level management employee of respondent Philips Roxane serving as Director of Pharmaceutical Research. He testified that when he worked for Diamond Laboratories (a settling defendant) in 1964, he learned that Dr. Herrick consulted for Diamond. Jungk Dep. at 33, 35, R.A.-18a. Jungk left Diamond in July 1964 (Id. at 12, R.A.-17a), and was not employed again in the animal health industry until 1970, when he became an employee of respondent Philips Roxane. Id. at 41-45, R.A.-19a-21a. In 1972, Jungk learned that Herrick was a consultant for Philips Roxane. Id. at 35, R.A.-18a-19a. He had no knowledge of Herrick's continuing relationship with Diamond since he left that Company's employ (Id. at 139, R.A.-22a), and further he never discussed Herrick's relationship with Diamond with anyone at Philips Roxane. Id. at 36, R.A.-19a. Clearly, the District Court's finding that no "corporate defendant" was aware of Herrick's consulting relationships with other "corporate defendants" is correct.

In a larger sense, however, the exclusivity of Herrick's consulting arrangements is immaterial because of the District Court's findings that none of the consulting arrangements included an agreement to harm Impro. Indeed, the District Court concluded that there were never any communications between Herrick and any of the other respondents even mentioning Impro or its products prior to the filing of this action in 1978. This finding is unchallenged by Petitioner! There can be no rimless wheel if there are no spokes. There can be no conspiracy of any sort without communication. Thus, having no factual basis, Petitioner's second issue is a mere invitation to the Court to give an advisory opinion.

With regard to Issue IV in the Petition little need be said other that the Court of Appeals ruled in Petitioner's favor on this theory, as did the District Court (715 F.2d 1267 at 1273, A-10, A-48-49), but both found no factual

predicate. Further, it might be noted that joinder of two such causes of action—or six—as Petitioner now claims to have pled, could present tremendous problems in the trial of such a cause relating to issues such as fact of damage, allocation of damage awards, joint and several liability among defendants and admission of evidence including hearsay during the course of a trial. Joining such claims could create an incredible procedural and evidentiary morass which should not be waded into unless demanded by necessity. These difficult issues should be dealt with only when a genuine factual predicate for them appears in the record.

II. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE APPROPRIATE SUMMARY JUDGMENT STANDARD WAS APPLIED AND NO CONSTITUTIONAL CLAIM HAS BEEN PRESERVED

If Petitioner's Issue III can be read as a claim of violation of its rights under the Fifth Amendment to the Constitution of the United States, such issue has not been previously raised or preserved. See R.A.-23a-27a. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). Further, Issues III and V constitute nothing more than a review of the facts and an attempt to draw this Court into a reconsideration of the facts and the inference to be drawn from them. Such is not the role of this Court. *Berenyr v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graves Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1948); *United States v. Johnson*, 268 U.S. 220, 227 (1925).

However, regarding Issue V, it should be noted that both the District Court and the Court of Appeals below applied the appropriate standards in granting and affirming summary judgment. The District Court stated that:

> "[Summary judgment] is an extreme and treacherous remedy, not to be entered unless the movant has established its right to judgment with such clarity as

> to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." [Citing Authorities] A-31.

Further, the able District Judge observed that all inferences must be viewed in the light most favorable to the Petitioner here and that summary judgments are somewhat disfavored in antitrust cases particularly when motive or intent is in issue. A-31.

Likewise, the Court of Appeals was solicitous of the Petitioner's cause and reviewed carefully the District Court's findings. 715 F.2d 1267 at 1272, A-8. Neither court found any evidence from which a conspiracy to harm Petitioner could be inferred. No important factual finding appears justifying this Court's further review.

CONCLUSION

This case does not present any substantial issue for the Court to review. It does not help Petitioner to observe that this Court has never specifically addressed the issue of whether a Sherman Act violation could occur as a result of a "hub-and-spoke" conspiracy as such an allegation has only been made three times in reported cases in almost forty years. Petitioner's plea for this Court's intervention to review the standards to be applied in assessing inferences to be drawn from facts does not fairly arise in this case because there was simply no evidence of communication between respondents concerning Petitioner let alone communications from which conspiracy reasonably could be inferred.

The only questions Impro raises in its petition center on particular facts in the case and are only of concern to the parties to this cause. Every substantial legal issue arising in this cause has been resolved in Petitioner's favor. Essentially what Petitioner desires is another review of the entire discovery record to ferret out what two thoughtful and diligent courts have been unable to

perceive—evidence of a conspiracy sufficient to warrant a jury determination. As this burdensome request is inappropriate, certiorari should be denied.

Respectfully submitted,

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* Counsel of Record

DATE: January 16, 1984.

APPENDICES

APPENDIX RA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC., a Minnesota corporation,
Plaintiff,

vs.

JOHN B. HERRICK, BABSON BROTHERS CO., an Illinois corporation; RICHARDSON, MEYER AND DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation,

Defendants.

MOTION FOR REHEARING OF ORDER
GRANTING SUMMARY JUDGMENT
(Oral Argument Requested)

Impro Products, Inc. through counsel, hereby moves the Court, pursuant to Rule 59(e)* of the Federal Rules of Civil Procedure, for reconsideration Court's Order of August 13, 1982, granting defendants' Motions for Summary Judgment and dismissing all remaining defendants. In support of this Motion, Plaintiff submits that this court has seriously misconstrued Plaintiff's theory of liability under the antitrust laws, and as a result thereof has misapplied the applicable law. In support of this Motion, Plaitniff states as follows:

---

* Although Rule 59(e) speaks in terms of a motion to "alter or amend" a judgment, it is clear that the rule is the proper

I. INTRODUCTION

The basis for this court's ruling granting Summary Judgment to the remaining Defendants—simply put—is that Plaintiff has been unable to develop proof of a horizontal conspiracy among the corporate defendants. *See* Memorandum Opinion at 21-25. The answer to this purported lack of proof—equally simply stated—is that under plaintiff's theory of liability proof of agreement between or among the corporate defendants *inter sese*, or even knowledge as to the identity of such corporate co-conspirators, is unnecessary, and that proof upon which an inference of knowledge that others must be involved is sufficient to establish the element of concerted action. Plaintiff further submits that the public policy considerations recently enunciated by the Supreme Court in *ASME* v. *Hydrolevel Corp*, —— U.S. ——, 102 S.Ct. 1935 (1982) strongly favors a finding of antitrust liability on the basis of the facts presented in this case.

II. PLAINTIFF HAS ESTABLISHED THE ELEMENT OF CONCERTED ACTION THROUGH PROOF OF AGREEMENTS BETWEEN DEFENDANT HERRICK AND THE CORPORATE DEFENDANTS; THE DOCTRINE OF CONSCIOUS PARALLELISM THEREFORE HAS NO APPLICABILITY TO THIS CASE.

A. *The Concept of Conscious Parallelism*

Section 1 of the Sherman Act makes unlawful a *contract, combination* or *conspiracy* in restraint of trade. Thus in order to establish liability for a violation of Section 1, one of the essential elements Plaintiff must prove is concerted action—that is—the participation of more

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procedural vehicle to use when a party seeks to vacate an order awarding summary judgment. *Parks* v. *"Mr. Ford"*, 68 F.R.D. 305, 308-309 (E.D. Pa. 1975). See also *United States* v. *Hall*, 463 F. Supp. 787, 791 fn. 1 (W.D. Mo. 1978), aff'd, 588 F.2d 1214 (8th Cir. 1978).

than one person in carrying out the alleged restraint. For example, if an established firm, acting wholly independently of others, attempts to throw roadblocks in the way of an innovative competitor, regardless of the nature of the misdeeds, the lack of the "two or more persons" requirement would insulate the established firm from antitrust liability under Section 1. Let us suppose, by of way of further example, that instead of one established firm engaging in acts designed to prevent an innovative competitor from developing its market potential that there are several established firms engaged in such activity. Assuming that there was no proof of agreement among them (or between any of them) to stifle the innovative competitor, would there be a Section 1 violation? Clearly not. The element of concerted action would not be present. In certain instances, however, it can be demonstrated that all of the defendants have engaged in the same behavior, and that the acts of each of the defendants—if performed independently of the others—would not make good business sense, but these same acts would be ecomically beneficial to all if all participated. Examples of this situation are most frequently found in the refusal to deal, price fixing and group boycott categories. Each business can be presumed to desire as many profitable sales as possible. Thus when an opportunity to make a sale at one's established price is declined, a serious question arises as to why the refusal to sell is made. If, say, all of the major manufacturers of a particular product were to establish a policy of refusing to sell to a retailer who engages in price competition, the fact such refusals to deal are contrary to each of their economic interests, acting independently, can be the basis for a finding of concerted action. The same can be said for a group of retailers who refuse to buy from a wholesaler who competes at the retail level.* In contrast, where

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* *See, e.g., Eastern states Retail Lumber Ass'n* v. *United States*, 234 U.S. 600 (1914).

it makes good business sense for a firm to establish the same policy as its competitors—for example, film distributors only granting first run films to large urban (downtown) theatres rather than small suburban theatres,** or banks charging the maximum inteerst rate permitted by the law ***—there is no basis for a finding of concerted action.

There are two aspects of "conscious parallelism" in the antitrust law that must be distinguished. First, as has been noted above, parallel activity of two or more firms, where such activity is contrary to their economic interests if each were acting independently but in the economic interests of all acting jointly, can in and of itself be the basis under Sherman 1 for satisfying the concerted activity requirement.* In contrast, in cases where the "concerted activity" requirement has already been met by proof of an agreement between two or more persons, proof of additional, consistent, parallel overt acts can also be used by the trier of fact as proof that the alleged anticompetitive acts were performed pursuant to such agreement, as opposed to wholly independent reasons or motivations. In the former case the "contrary to eco-

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** See *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978).

*** See *Weit* v. *Continental Ill. Nat'l Bank*, 641 F.2d 457 (7th Cir. 1981).

* There is another distinguishing factor that must be kept in mind, which is the fact that in nearly all "conscious parallelism" cases there is nothing wrongful about the conduct alleged if performed independently, and that it is the concerted nature of the activity (i.e. price fixing, concerted refusals to deal, group boycott, etc.) that constitutes the antitrust violation. This is in marked contrast to cases in which it is alleged that conduct wrongful or toritous in and of itself is carried out by means of concerted activity. In the latter type of case failure of the defendants to explain an alternative motivation for the wrongful conduct, where an obvious anticompetative motive exists, would tend to corroborate the existence of the conspiracy.

nomic interests" proof is essential. In the later case there is no logical basis for such requirement.

B. *Proof of Each Herrick/Corporate Defendant Agreement Establishes the Concerted Activity Requirement under Sherman 1.*

Let us assume, for the moment, that rather than bringing this action against all of the defendants, the case had been brought against Defendants Herrick and Phillips-Roxane, Inc. alone. Plaintiff at trial would first establish that Herrick had at one point expressed favorable views towards Impro, had placed an article favorable to the company in a learned journal, and expressed an interest in assisting the company in marketing its products. Further assume that Impro is then able to establish that Herrick's interest in helping Impro suddenly waned when it became apparent that he was not going to get paid for his efforts. Let us then further assume that Impro is able to establish that its products offer a substantial competitive threat to Philips Roxane. Let us then add evidence that (1) Philips Roxane entered into a contract with Herrick which by the admission of both of them is in the commercial area—that is—the marketing of products as opposed to technical advice, and (2) the fact that Herrick reversed his position and commenced a virtual campaign against Impro. Based on this record a material fact issue would arise as to whether Herrick was acting against Impro on behalf of Philips Roxane (clearly a conspiracy to restrain trade) or for reasons independently of the Herrick/Philips Roxane relationship. Plaintiff submits that under these facts it could prove its case against any of the defendants individually, with Herrick as the co-conspirator. Two quesitons then arise: (1) Did Impro plead itself out of court by bringing into the case more than one corporate defendant on whose behalf Herrick is alleged to have acted; and (2) does proof that the corporate defendants were

simultaneously engaged in addition, public opposition to the development of intrastate laboratories (Impro being one of the two targets of this activity) make it more likely that Herrick's activities were performed in order to advance what he perceived to be his clients interests? Plaintiff submits, in answer to the first question, that even if at trial it were determined that a so-called "rimless wheel" conspiracy existed, all that is required among the "spokes" in such a conspiracy is a factual basis for an inference that other parties must be involved. *See* Kintner, *Federal Antitrust Law*, at S9.3, p. 10 at fn.33; *Elder-Beermen Stores* v. *Federated Department Stores*, 459 F.2d 138 (6th Cir. 1972); and *Harlem River Consumers Cooperative* v. *Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251 (S.D.N.Y. 1976). In answer to the second question, it is clear that Plaintiff does not rely on "other acts" as evidence of "conscious parallelism" to overcome the concerted action requirement of Sherman 1, but rather relies upon this evidence as further proof as to the defendant's interest in opposing Impro's development in its capacity as an intrastate laboratory.

III. THE PUBLIC POLICY CONSIDERATIONS THAT UNDERLIE HOLDING CORPORATIONS LIABLE FOR THE ANTICOMPETITIVE ACTS OF THEIR AGENTS APPLY EQUALLY TO CONSULTANTS ACTING SECRETLY ON THEIR BEHALF

Antitrust law is much like Constitutional law, in that the federal courts play a critical role in shaping, modifying and developing the law, in response to an ever changing business and economic climate. As Judge Wyzanski stated in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D.Mass. 1953):

> In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of the law.

This judicial interpretative process was discussed by the Supreme Court in *Apex Hosiery Co.*, v. *Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 989-90, 84 L.Ed. 1311, 1320-21 (1940):

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, and in the performance of that function *it is appropriate that courts should interpret its words in light of the legislative history and of the particular evils at which the legislation was aimed.* (emphasis added).

Particularly in the heavily regulated industries, enormous potential economic dislocations, of the nature that the antitrust laws were designed to prevent, can result from the co-opting of or compromising of government officials. For this reason, this case raises serious and far reaching issues of public policy and the administration of the antitrust laws.

Although Plaintiff by no means concedes that it will be unable to prove a conspiracy directly aimed at Impro, even if a jury were to find, at a minimum, that the corporate defendants entered into a contract with Extension Veterinarian Herrick which simply called for Herrick to look out for their best economic interests, and Herrick then commenced throwing roadblocks in the path of Impro's development as one way to carry out this general consulting assignment, this would be a more than adequate basis in the law to hold the corporate defendants to account for the anticompetitive acts of its secret consultant. It has long been recognized that if a corporation lends apparent authority to an agent, the corporation is responsible for the antitrust violations of such agent acting within the scope of his authority even if the agent acts in contravention of the express orders, policies and

wishes of his company. See, *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-107, (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied.*, 437 U.S. 9032 (1978); *United States* v. *American Radiator & Standard Sanitary Co.*, 433 F.2d 174, 204 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). To hold a corporation liable for the anticompetitive acts of its consultants, pursuant to a consulting agreement that calls for assistance in the commercial area, would be consistent with this policy.

Further, even if a jury were to believe the corporate defendant's protestations that they only intended Herrick to perform lawful acts in the course of his alleged consulting duties, "a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent *or of an anticompetitive effect.*" *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 243, (1980), *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436, n.13 (1978).

Even minor actions by an individual with the influence both within and outside federal and state government possessed by Extension Veterinarian Herrick can have a devastating effect on the future of a new competitor in the animal health field. Indeed the evidence in this case demonstrates how efficiently such power can be used. Once private corporations take it upon themselves to "buy" a federal official, they should be held to account for his anticompetitive conduct. To hold otherwise would permit private companies to compromise such government officials by hiring them as "consultants" to do whatever appears to the official to be in the company's best interest, and to then disavow the relationship if the official is found to be engaging in anticompetitive conduct. It is all too easy when the official takes an action that seriously impacts a competitor, to simply swear that the anticompetitive acts were not part of the "consulting" arrangement.

The Supreme Court in *American Society of Mechanical Engineers* v. *Hydrolevel Corp.* —— U.S. ——, 1025 S.Ct. 1935 (1982) recently upheld a verdict of antitrust liability on the part of an association for acts of its agent, which were performed by the agent without the associations' active participation. The public policy of holding the association responsible for its agent's acts played a big role in the decision in that case:

> A principal purpose of the antitrust private cause of action, see 15 U.S.C. 15, is of course, to deter anticompetitive practices. *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 314, 98 S.Ct. 584, 588, 54 L.Ed.2d 563 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S., at 139, 88 S.Ct., at 1984; see *Reiter* v. *Sonotone Corp.* 442 U.S. 330, 342-344, 99 S.Ct. 2326 2332-2333, 60 L.Ed.2d 931 (1979). It is true that imposing liability on ASME's agents themselves will have some deterent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126, 79 S.Ct. 203, 207, 3L.Ed.2d 165 (1958). Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus a rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.

The wisdom of the apparent authority rule becomes evident when it is compared to the alternative approaches advanced by the District Court's instructions to the jury, see supra, at 1941, and advocated ASME. First, ASME insists that it should not be held liable unless it ratified the actions of its agents. But a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws. *ASME could avoid liability by ensuring that it remained ignorant of its agent's conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents. Thus, ASME's ratification theory would actually enhance the likelihood that the society's reputation would be used for anticompetitive ends.*

Second, ASME contends that it should not be held liable unless its agents act with an intent to benefit the Society. This proposed rule falls short, though, because it is simply irrelevant to the purposes of the antitrust laws. Whether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practice of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers. (emphasis added).

This case revolves around one critical and very material fact question: was Herrick acting on behalf of the corporate defendants, or for some other reason? For

Herrick to get a jury to believe that he was acting in good faith he has a lot of explaining to do concerning his early enthusiasm for Impro. Plaintiff submits that there are strong public policy considerations favoring antitrust liability in this case, and that the matter should properly be submitted to a jury for a determination of these important issues.

IV. THERE ARE SUBSTANTIAL CREDIBILITY ISSUES IN THIS CASE CONCERNING THE SCOPE OF THE HERRICK/CORPORATE DEFENDANT AGREEMENTS

As was correctly pointed out by the Court's Memorandum Opinion at 8-9, one of the central issues in this case is whether Herrick's activities against Impro were conducted as part of the conspiracy. If the agreements between Herrick and each of the corporate defendants were true consulting arrangements, one would suppose that both Herrick and the corporate defendants would be able to reach some common understanding as to what Herrick's role was, and that there would be no reason to keep the relationship secret. The record demonstrates, however, considerable inconsistencies in the mutual understanding as to the scope and terms of the relationship. For example, Herrick reported to Iowa State University one or two days a year of "consulting" with the corporate defendants, for amounts ranging up to $10,000 for RM&D. Upjohn issued checks to Herrick for "research", yet Herrick says he did no research for Upjohn. (Herrick Dep. at 521-24). Herrick says he works for Philips Roxane for two days a year while John Thompson claims Herrick works for that firm ten days a year. (See Herrick Dep. at 319, Thompson Dep. at 338). There is little evidence in the record that Herrick did anything of substance for RM&D for his $10,000 per year.* Serious ques-

* There is also a conflict of testimony as to whether RM&D reported annually to American Cyanamid concerning the consulting

tions about Herrick's credibility in general have also been raised. Herrick is obligated to report his outside consulting relationships to Iowa State University, yet in 1978 he disclosed *no* such relationships. (Dep. of Dean Pearson at 35-50). Apparently Herrick saw his contacts with senior USDA executives as official business for Philips Roxane, inasmuch as entertainment expenses for drinks at a convention for such officials were billed by Herrick to that firm. (Herrick Dep. at 635-637).

The Court's finding that none of the corporate defendants knew that the other corporate defendants were utilizing Herrick's services is not accurate in one respect. Noman Jungk knew about the Diamond/Herrick connection while at Diamond in 1964, and learned of the Philips Roxane/Herrick relationship while employed by Philips Roxane in 1972 (Jungk Dep. at 33, 35).

In view of the serious credibility issues that revolve around the actual scope of the Herrick/corporate defendant agreements, as well as credibility questions as to whether Herrick's actions were taken pursuant to the agreements, summary judgment in this case was clearly inappropriate.

V. CONCLUSION

In preparing its Opposition to Defendant's Motion for Summary Judgment, Plaintiff was of the view that the anticompetitive acts that demonstrated the operation of the conspiracy in this case were of paramount importance, and Plaintiff may have inadvertently given inadequate attention to explaining its theory of concerted action. Plaintiff submits that the doctrine of "conscious parallelism" has no applicability to a case in which the major

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relationship. Compare Donofrio Dep. at 55-56 with Reynolds Dep. at 35. It should be noted that Herrick and American Cyanamid continued to have contacts after RM&D and Herrick entered into this agreement. See Herrick Dep. Ex. #243, 244 and 250. Donofrio also "thinks" Cyanamid would entertain the thought of reimbursing RM&D for legal expenses in this case. (*Donofrio* Dep. at 50-51).

fact issue is whether particular anticompetitive acts were undertaken pursuant to an agreement, which is conceded to exist, but concerning which the terms and purpose are disputed. Plaintiff further submits that there are strong public policy considerations favoring antitrust liability on the part of the corporate defendants in this action, and that there are credibility questions that can only be properly resolved at trial.

Respectfully submitted,

/s/ Philip C. Jones
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APPENDIX RB

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC., a Minnesota corporation,
Plaintiff,

—vs.—

JOHN B. HERRICK, DIAMOND LABORATORIES, INC., a Delaware corporation; BABSON BROS. CO., an Illinois corporation; G. D. SEARLE COMPANY, a Delaware corporation; RICHARDSON, MEYERS & DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation,
Defendants.

DEPOSITION OF NORMAN K. JUNGK, produced, sworn and examined on Friday, the 25th day of June, 1982, between the hours of 8 a.m. and 6 p.m. of said day, at the law offices of Blackwell, Sanders, Matheny, Weary & Lombardi, 600 Five Crown Center, 2480 Pershing Road, in the City of Kansas City, County of Jackson and State of Missouri, before:

DANNY S. PEAK,

a Notary Public within and for the County of Jackson and State of Missouri, in a certain cause now pending in the United States District Court for the Southern District of Iowa, Central Division, wherein IMPRO PRODUCTS, INC., a Minnesota corporation, is Plaintiff and

JOHN B. HERRICK, DIAMOND LABORATORIES, INC., a Delaware corporation; BABSON BROS. CO., an Illinois corporation; G. D. SEARLE COMPANY, a Delaware corporation; RICHARDSON, MEYERS & DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation, are Defendants.

Taken on behalf of Plaintiff.

* * * *

[8] Q And for how long did you hold the position of production manager for biologics at Diamond?

A About—about three years.

Q Sometime in 1959, did you subsequently receive a new job title?

A About '59 or '60 I became executive vice-president which entailed the duties of a technical vice-president. The title was officially executive vice-president, but the duties were related to the technical side of operations. I had no responsibilities for marketing or sales during my entire period at Diamond. It was all related to the technical functions.

[9] Q Now, when you say the technical function, what exactly does that entail?

A Manufacturing, quality control, and professional service.

Q And what duties would you have with respect to supervision of manufacturing as executive vice-president?

A I would hire and supervise key managers. I would plan production schedules as required by the company for marketing, and I was responsible for the master plan which encompassed the development of new products and bringing them on stream for marketing.

Q Now, would this be—

A I was also—as technical director, I was also in charge of research.

Q You were director of research?

A I was in charge of research. I was not director.

Q Now, as executive vice-president, would you have just been in charge of biologicals or were they also producing, manufacturing or distributing antibiotics?

A We were formulating pharmaceutical products at that time which included the formulation of antibiotics.

Q But when you originally took over the position as executive vice-president, Diamond was not manufacturing, marketing or selling any pharmaceuticals?

[10] A At the time I took over the position, they were already manufacturing and selling pharmaceuticals, and had been well established in that for some years.

Q So you would have also taken over those functions or been in charge of pharmaceutical production?

A I was at the time I became vice-president, yes, but this program had been ongoing for a number of years.

Q I see. Now, from 1956 to 1959, did—prior to your accepting a new position, did your employment responsibilities or duties ever change as production manager for biologics, in that you gained new responsibilities or lost former responsibilities?

A Not substantively.

Q Did there come to be a point in time where you ever had any supervision over pharmaceutical products?

A Yes.

Q Prior to your becoming executive vice-president?

A No, no participation whatsoever in pharmaceutical products prior to about 1959, 1960.

Q Okay. In addition you listed one of your duties was overseeing quality control?

A Yes.

Q And what did that entail?

A The testing of all products prior to release and issuing a release for those products.

[11] Q Was that the extent of your involvement with quality control, just the testing?

A I supervised the manager of quality control who personally supervised those functions.

Q I think you also mentioned that one of your duties was with respect to professional services?

A Yes.

Q What does that entail?

A Professional services is a service which veterinary, pharmaceutical, and biological companies offer to those veterinarians, livestock owners, which use their products and involves technical advice, technical discussions relative to problems, related to immunization related to disease.

Q Would that be a position otherwise known as technical services?

A Yes.

Q Similar to the position that Dr. Daniels formerly held at Philips Roxane?

A Yes.

Q Do you know who at Diamond currently holds that position?

A No.

Q With respect—was that the extent of your duties with respect to professional services?

[12] A Yes.

Q With respect to being in charge of research, what did that entail?

A The administrative planning of research programs in cooperation with marketing and the research director?

Q Who was the marketing and research director at that time, would those have been two individuals or one individual?

A At that time it was one individual.

Q And what was that person's name?

A And his name was Mr. William Wittern, W-i-t-t-e-r-n.

Q And did your duties—for how long did you hold this position as executive vice-president?

A Until such time as I departed in July of 1964.

• • • •

[33] Q And how did you become aware of that fact?

A I do not remember at this time.

Q Did he have any type of input with respect to any of your responsibilities?

A No, he did not.

Q Do you know to whom he reported?

A Not specifically, I do not know.

Q Well, you were at that time the executive vice-president in charge of manufacturing, quality control, professional services and research?

A That's true.

Q Would Dr. Herrick have been reporting to anyone in your departments?

A No, he was not.

Q Do you know what duties Dr. Herrick had as a paid consultant for Diamond Laboratories?

A I believe he gave general information on sales.

Q He would not provide technical knowledge?

A No, not to the technical departments.

Q Do you know from whose budget Dr. Herrick's consulting fees were being paid?

A I do not know, but they were not from the technical department budgets.

• • • •

[35] Q Was it your understanding that Dr. Herrick was a consultant prior to 1964 for Diamond?

A As I mentioned earlier, that was my first knowledge of it, was in 1964.

Q Well, you became aware of it—

A In 1964, that's true.

Q However, when you became aware, were you aware that he may have been previously consulting, or was it your awareness that this is when his consulting began?

A I have no recollection as to when he might have begun consulting for Diamond Laboratories.

Q Were you aware that Dr. Herrick was a paid consultant of Philips Roxane after you subsequently became reemployed by them?

A Yes.

Q And when did you become aware of that fact?

A Approximately 1972.

Q And do you recall how you became aware of that fact?

A Yes. Dr. Herrick spoke at a staff meeting.

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[36] Q When you became aware that Dr. Herrick was a consultant for Philips Roxane, did you ever indicate to anyone that you were previously aware that he had been consulting for Diamond?

A No, I did not.

Q You never remember telling anyone at Philips Roxane that Dr. Herrick was formerly a Diamond consultant?

MR. BORTHWICK: I object to the question as repetitious. Go ahead.

THE WITNESS: I don't remember discussing that at all.

• • • •

[41] Q In 1964, did you subsequently leave employment at Diamond Laboratories?

A Yes, I did.

Q And with whom did you seek employment?

A Pure Laboratories, Incorporated.

Q And where was Pure Laboratories, Incorporated, located?

A Pure Laboratories was incorporated in the State of New York and located in Parsippany, P-a-r-s-i-p-p-a-n-y—I'm not sure I spelled that correctly. P-a-r-s-i-p-p-a-n-y, New Jersey.

Q And how did you come to become employed at Pure Labs?

A I visited the owner.

Q And who was that?

A Mr. C. C. Wang, W-a-n-g.

Q And was this a federally-licensed lab?

A This was a human—this laboratory manufactured human pharmaceutical drugs and in the broad sense of the word "licensing", was licensed to manufacture certain human pharmaceutical products.

• • • •

[42] Q And what was the name of that product?

A The general name of the product is Pen-Dihydro, D-i-h-y-d-r-o. And it is an antibiotic for cattle. And we did manufacture that at Pure. It was one of a number of products that Pure manufactured, and the only one that was sold in the veterinary market.

Q Do you know if this was sold through licensing agreements with other manufacturers?

A It was not sold through licensing agreements, no.

Q It was sold directly to the consumers?

A It was sold just as any sale would take place, and it was a business sale.

Q To sell the entire product to a company?

A Yes.

Q Would they relabel the product and put their labels on it?

A We may have sold some unlabeled products. Primarily we sold labeled products.

Q Okay. Are you aware of any sales of either labeled products or unlabeled products to either the Anchor Serum Company or any predecessors, or people who may have subsequently acquired Anchor or Diamond Laboratories of that product?

A I do not believe we sold Anchor. I am uncertain of [43] Diamond.

Q You may have sold this product to Diamond?

A We may have. I am uncertain.

Q And what was your job—or what was your title at Pure Labs?

A I was vice-president in charge of operations.

Q And how long would you have remained employed at Pure Labs?

A From 1964 until 1968.

Q And why did you leave Diamond Laboratories, was there any personality problems or did you perceive this as being a better job or were there other reasons?

A I perceived my opportunities at Pure Laboratories to be greater.

Q And in 1968, you left Pure Laboratories?

A Yes.

Q And what did you then do?

A I created a company of my own called Romar Laboratories, R-o-m-a-r, with headquarters in Hanover, New Jersey.

Q And what did Romar Laboratories do?

A They manufactured human pharmaceuticals, and a limited, small amount of veterinary pharmaceuticals.

Q Which animal pharmaceuticals would they have been manufacturing?

[44] A Sulfa drugs.

• • • •

Q And did there come to be a time when you eventually returned to Philips Roxane, or was that Anchor at that time?

A It was Philips Roxane at the time I returned in April of 1970.

Q Does Romar Laboratories still exist?

A I do not know.

Q Did you sell that company?

A Yes.

Q And why did you sell the company and seek employment at Philips Rozane?

A Because of financial considerations.

• • • •

[45] Q And in 1970, did you take the position of director of quality assurance for Philips Roxane?

A Yes.

Q And with whom would you have contacted to take a position with Philips Roxane?

A Dr. Fred Murdock.

Q You would have just contacted Dr. Murdock directly?

A Yes.

Q Did you feel that you knew Dr. Murdock well enough to directly contact him?

A Yes.

Q And what was his position at that time?

A President of Philips Roxane.

* * * *

[139] Q You were aware that he was a consultant in 1978?

A Yes, I was aware of that.

Q So when you saw him in 1972 speak to the staff members, that was'nt your only indication of his being a consultant, was it?

MR. BORTHWICK: Well, he's never testified to that. I object to the argumentative question. He's never said that.

THE WITNESS: I knew on an ongoing basis that Dr. Herrick was a consulant, yes.

Q (By Mr. Daniels) Okay. Now, just to clarify the record, was that also true of Dr. Herrick's consulting relationship and your knowledge as to Dr. Herrick's consulting relationship with Diamond Laboratories?

A I had no knowledge of Dr. Herrick's relationship with Diamond Laboratories since I left Diamond Laboratories in 1964.

* * * *

APPENDIX RC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2124

IMPRO PRODUCTS, INC.,
Plaintiff-Appellant,

v.

JOHN B. HERRICK, BABSON BROS. CO.,
RICHARDSON, MYERS & DONOFRIO, UPJOHN CO.
AND PHILIPS ROXANE, INC.
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of Iowa

BRIEF FOR THE APPELLANT

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ISSUES PRESENTED

1. Whether the District Court erred in granting Summary Judgment on the basis of a finding that the evidence failed to establish the "concerted action" element of a Sherman Act § 1 violation.

American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., —— U.S. ——, 102 S.Ct. 1035 (1982).

International Travel Arrangers, Inc. v. Western Airlines, Inc., 635 F.2d 1935 (8th Cir. 1982).

2. Whether the District Court further erred in relying upon the concept of "conscious parallelism" in an attempt to find concerted action among the defendants.

Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8tth Cir. 1978)

First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968)

Weit v. Continental Ill. Nat'l Bank and Trust Co., 614 F.2d 457 (1981)

3. Whether the extent of knowledge of each corporate defendant concerning the participation by others in the alleged conspiracy was a matter to be ruled upon by the Court at the close of trial upon framing the jury instructions, rather than prior to trial on the basis of Motions for Summary Judgment.

United States v. Jackson, No. 81-2411 (8th Cir.) slip op. filed December 28, 1982.

Elder Beerman Store Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972).

APPENDIX RD

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2124

IMPRO PRODUCTS, INC.,
Plaintiff-Appellant,

v.

JOHN B. HERRICK, BABSON BROS. CO.,
RICHARDSON, MYERS & DONOFRIO, UPJOHN CO.
AND PHILIPS ROXANE, INC.
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of Iowa

REPLY BRIEF FOR THE APPELLANT IMPRO PRODUCTS, INC.

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